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Proscribing Retaliation Under Title VII

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Title VII of the Civil Rights Act of 1964[1] protects individuals from employment discrimination because of their racial, ethnic, religious and sex status.[2] In addition, employers and labor

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[1]Sections 701-18, 42 U.S.C. §§ 2000e to 2000e-17 (1970), *as amended*, (Supp. III, 1973) [hereinafter cited as Act].

[2]Act § 703, 42 U.S.C. § 2000e-2 (1970), *as amended*, (Supp. III, 1973), provides:

> (a) It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
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> (b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.
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> (c) It shall be an unlawful employment practice for a labor organization—
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> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
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> (2) to limit, segregate, or classify its membership, or applicants for membership or to classify or fail or refuse to refer for employment any individual, in any way which would deprive

unions are prohibited from discriminating against persons because of their opposition to employment discrimination.[3] Given the ever expanding definition of employment discrimination[4] and the burgeoning number of Title VII complaints,[5] employers and unions might wonder whether they have been relieved of all discretion to select and discipline their employees and members. Their wonderment is without justification. Employers and unions are as free now as prior to the enactment of Title VII to engage in the kinds of discretionary decision-making which seek and supply a stable, efficient, unified and productive work force. The only discretionary acts proscribed by Title VII are those invidious and sometimes unconscious acts which have penalized generations of minorities and women and which seemingly would have yielded the antithesis of stability and productivity had women and minorities ever comprised significant proportions of the work force. This Article discusses one form of unlawful discrimination—that which is occasioned by opposition to discrimination. The problems posed to the Equal Employment Opportunity Com-

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or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

[3]Act § 704(a), 42 U.S.C. § 2000e-3(a) (1970), *as amended,* (Supp. III, 1973), provides:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

[4]*See* Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *and Its Concept of Employment Discrimination,* 71 MICH. L. REV. (1972); Jones, *Federal Contract Compliance in Phase II—The Dawning of the Age of Enforcement of Equal Employment Obligations,* 4 GA. L. REV. 756 (1970); Note, *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964,* 84 HARV. L. REV. 1109 (1971).

[5]1972 EEOC ANNUAL REPORT. The report announced the Commission's incoming workload for fiscal year 1972 as 51,969 charges. *Id.* at 36. The Commission's Chairman, John Powell, recently stated that in fiscal year 1975 the Commission would receive 75,000 charges. Singer, *Employment Report: Internal Problems Hamper EEOC Anti-bias Effort,* NATIONAL JOURNAL REPORTS 1229 (August 17, 1974).

mission (EEOC) and the courts by this form of discrimination are manifold and are accentuated because they often closely resemble the proper exercise of employer discretion.

I. The Burden and Necessity of Opposition

Section 704(a)[6] of the Civil Rights Act of 1964 protects individuals who oppose unlawful employment discrimination from reprisals because of their opposition. This protection is assuredly important to the immediate victims of section 704(a) discrimination. The protection is additionally important because the enforcement scheme of Title VII,[7] through design and happenstance, relies almost entirely upon the willingness of the victims to shoulder the responsibility of "opposition."[8] Recognition of this fact and the unschooled nature of lay "opposition" has permitted courts to overlook technical deficiencies in administrative complaints filed with the EEOC.[9] This has led to an expansive reading of such complaints to include "similarly situated" classes of discriminatees[10] and "like or related" forms of discrimination.[11]

A. Enforcement of Title VII

The enforcement provisions of federal antidiscrimination laws were never designed to be expeditious or efficient.[12] The Commission established by Congress in 1964[13] had neither adjudicatory nor rulemaking power. Neither did it have power to support its own administrative findings except through the filing of amicus briefs in pending litigation. What the Commission did have, however, was a meagre budget and, almost from its inception, a back-

[6] 42 U.S.C. § 2000e-3(a) (1970), *as amended,* (Supp. III, 1973).

[7] See text accompanying notes 12-25 *infra.*

[8] The term is used throughout this Article to connote opposition to practices unlawful under section 704(a).

[9] *See* Note, *supra* note 4, at 1198-1218.

[10] *See* Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970); Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968).

[11] Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970).

[12] *See generally* U.S. Civil Rights Comm'n, Federal Civil Rights Enforcement Effort 55-423 (1971); R. Nathan, Jobs and Civil Rights 1-149 (1969).

[13]

> There is hereby created a Commission to be known as the Equal Employment Opportunity Commission, which shall be composed of five members, not more than three of whom shall be members of the same political party. Members of the Commission shall be appointed by the President by and with the advice and consent of the Senate for a term of five years.

Act § 705(a), 42 U.S.C. § 2000e-4(a) 1970, *as amended,* (Supp. III, 1973).

log of uninvestigated and unresolved charges which now approaches 90,000.[14]

There can be little argument with the view that the Commission's major accomplishment to date has been its definition of employment discrimination through interpretive guidelines.[15] Nor can there be argument with the fact that its major failure has been its inability to redress discrimination suffered by the individual charging party.[16] Ironically, this circumstance has not and will not improve even with the enforcement powers conferred upon the Commission by the 1972 Amendments to Title VII[17] and the significant budgetary increases that the Commission has received during the past several years.[18]

Despite the presence of the little and ineffectively used Commissioner's charge device, the burden of triggering the Commission's enforcement scheme remains largely upon the individual.[19]

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[14]Singer, *supra* note 5, at 1226.

[15] *See* Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971).

[16]Persons filing charges of discrimination with the EEOC must wait an average of two years for the agency to process administratively the complaint. *See* H.R. REP. No. 238, 92d Cong., 1st Sess. 61 (1971). *See also* S. REP. No. 415, 92d Cong., 1st Sess. 4-8 (1971).

[17]

> If within thirty days after a charge is filed with the Commission . . . the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge.

Act § 706(f)(1), 42 U.S.C. § 2000e-5(f)(1) (Supp. III, 1973), *amending id.* § 2000e-5 (1970). *See also* Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824, 840-84 (1972).

[18]In fiscal year 1966, the first full year of Commission charge handling, the Commission operated on a budget of $3.25 million. 1966 EEOC ANNUAL REPORT 56. In fiscal year 1972, the last year preceding the Commission's receipt of enforcement power, the Commission's budget totaled $23 million. 1972 EEOC ANNUAL RERORT 50. In fiscal year 1972, the Commission operated on a budget of $43 million. 119 CONG. REC. 20,383 (daily ed. Nov. 14, 1973).

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> Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, [or] labor organization . . . has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, [or] labor organization . . . within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires.

Act § 706(b), 42 U.S.C. § 2000e-5(b) (Supp. III, 1973), *amending id.* (1970).

Also, under the 1972 Amendments, charged employers or unions must be notified within ten days that a charge has been lodged against them.[20] The Commission has reasonably interpreted this notice provision to require the inclusion of the name of the charging party.[21] However, it is unreasonable that the Commission will not investigate a charge or, more importantly, establish its involvement in regard to a charge for more than two years.[22] Even then, in all but a paltry number of cases the Commission will do no more than investigate the charge and attempt conciliation when appropriate. In the two years since the passage of the 1972 Amendments the Commission has brought approximately 328 suits.[23] Further, the Commission's litigation tracking system[24] dictates a future highly select and meagre caseload. Quite clearly then, the primary responsibility for enforcing Title VII will remain with the individual charging party and his attorney, if he is fortunate enough to secure one. The principal enforcement device will remain the traditional section 706 suit[25] instituted by the

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[20] *Id.*

[21] *But see* 37 C.F.R. § 1601.13 (1973):

> Within 10 days after the filing of a charge, the Commission shall furnish the respondent with a notice thereof by mail or in person (including the date, place, and circumstances of the alleged unlawful employment practice). Unless otherwise determined by the Commission, the notice shall not identify the person filing the charge or on whose behalf it was filed.

Despite the apparent viability of the regulation, Commission procedures were amended to provide for the inclusion of the charging party's name in the official ten day notice afforded the named respondent. *See* 1 EEOC COMPLIANCE MANUAL § 10-3 (Feb. 27, 1973).

[22] See note 16 *supra.*

[23] According to General Counsel William Carey, the Commisison, since the passage of the 1972 Amendments, has filed 328 direct suits, intervened in fifty-one suits brought by individuals, and sought preliminary relief in fourteen suits. 2 CCH EMPL. PRAC. GUIDE ¶ 5269 (1974) (testimony of Mr. Carey before the Equal Opportunities Subcommittee of the House Committee on Education and Labor, Sept. 17, 1974).

[24] The Commission's Track System targets large national and regional respondents for litigation from the beginning of the compliance process. Through the assignment of litigation teams comprised of investigators and attorneys to handle cases consolidating all outstanding charges against a designated respondent, the Commission seeks to utilize fully its inadequate litigation and compliance resources. Thus far five national respondents have been so targeted. *See* U. S. CIVIL RIGHTS COMM'N, FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—A REASSESSMENT 88 (1973); BNA Daily Lab. Rep. No. 137 A-7-10 (July 17, 1973).

[25]

> If a charge filed with the Commission . . . is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge . . . the Commission has not filed a civil action under this section or the Attorney General has not filed a civil

charging party who can expect as little assistance from the Commission as he has received in the past.

B. Those Who Oppose

Persons who oppose unlawful discrimination come in various sizes, shapes, stations, colors and sexes. Their methods of opposition are equally varied. Some file administrative complaints with state or federal agencies and courts; others disobey orders, file grievances, organize opposition groups, picket, encourage boycotts, or threaten all or some of these tactics. The employer and union are not, however, without an arsenal; they may, among other things, dismiss, demote, or reassign opposing employees, as well as deny them promotions or fail to support their grievances. Other weapons include ostracism, harassment, suspension, and surveillance. Thus, it is not surprising that the burden upon the employee, prospective employee or union member inclined to opposition concerns not the *form* but the *fact* of opposition. It is one thing to know of the existence of employment discrimination and even the possible methods by which it might be exposed; it is quite another thing to expose oneself in the process of opposition. Moreover, in the area of employment discrimination, the exposure occasioned by opposition is virtually complete. For example, an individual filing a simple failure-to-promote complaint may allege directly the unlawful prejudices of his superiors and his union with whom he must maintain a continuing acceptable relationship, and he invariably asserts indirectly that his personal qualifications are superior or equal to those of peers with whom he must work in future years. The pressures inherent in such a situation are present absent a possibility of reprisal. But the possibility or likelihood of reprisal immensely magnifies these pressures and adds more fundamental ones concerning an employee's ability to provide for his family, his ultimate lifetime opportunities and

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> action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved, or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.

Act § 706(f)(1), 42 U.S.C. § 2000e-5(f)(1) (Supp. III, 1973), *amending id.* § 2000e-5 (1970).

his relationship with or responsibility for other similarly situated class members.

In the ten years since the passage of Title VII, the nation has witnessed the rise of females and minorities to white collar positions, the virtual elimination of blatantly racist practices, and the dissolution of unions segregated on the basis of race and sex. Such "progress" and the rhetoric of "equal opportunity employers" have led minorities and women to believe, rightly or wrongly, that opportunity may be realized if they bide their time and maintain a low profile. Their situation is not unlike that of the aspiring Black assistant principal in the segregated schools of the South, who sought security by acquiescing to his White school board's discriminatory policies. The "era of equal employment" has thus created a neat "Catch 22" for some minority and female workers: the less one asserts one's rights to nondiscriminatory employment decision-making, the greater the opportunity for personal advancement, while the less one personally opposes employment discrimination, the greater the likelihood that it will continue to exist. The employee's decision to oppose discriminatory practices is, therefore, a significant one for himself and for those who would help him realize the fruits of nondiscriminatory employment. If section 704(a) is to achieve the broad protective character envisioned by the Commission and the courts, the decision to oppose as well as its permissible manifestations must be protected.

II. The Problem of Rapid Relief: Section 704(a) and Others

Recognition of the potential hardships suffered by individuals actively opposing employment discrimination, and of the necessity for their continued willingness to actively "oppose," mandates the effective enforcement of section 704(a) and similar remedies. Unredressed retaliation stifles the legitimate protests of depressed classes of discriminatees and thus reduces the effectiveness of the Act. Title VII, and indeed any antidiscrimination legislation, has an effect and purpose far beyond the immediate redress of individual grievances. The maintenance of continued faith in equality through law for those who oppose and all who would follow their example is at stake in every decision to oppose acts thought to be discriminatory. Rapid relief against retaliation for "opposing" is a cornerstone in the maintenance of that faith.

A. Pettway v. American Cast Iron Pipe Co.[26]

Peter Wrenn, a Black employee and spokesman for a Black employee group, filed a complaint with the EEOC and allegel that

[26] 411 F.2d 998 (5th Cir. 1969).

his employer was engaged in systemic racial discrimination violative of section 703.[27] During the pendency of his action before the district court, Wrenn was suspended for engaging in an altercation with a White worker. Wrenn again filed charges with the EEOC and alleged that his suspension was based upon his race and therefore was violative of section 703. The Commission found that the suspension was not racially motivated but permitted a "request for reconsideration" to be filed.[28] He seized this opportunity to challenge substantively the Commission's conclusions and investigative techniques and to allege that his employer had bribed the Commission's investigator. His employer, after being served with a copy of the request for reconsideration, promptly fired Wrenn and claimed that his allegations were false and malicious. Subsequent to the district court's dismissal of his original action on jurisdictional grounds and his notice of appeal, Wrenn almost simultaneously filed a new charge with the EEOC and petitioned the district court for injunctive relief pending his appeal pursuant to Federal Rule of Civil Procedure 62(c).[29] In his new allegations Wrenn alleged that his dismissal was racially motivated and was made in retaliation for his opposition to racial discrimination.

The district court dismissed Wrenn's rule 62(c) motion and found that it was ancillary to his primary action which had previously been dismissed on jurisdictional grounds. However, the court treated the motion as a new cause of action under section 704(a) despite Wrenn's failure to comply with the jurisdictional prerequisites to such a suit.[30] Not surprisingly, the court then found that Wrenn's discharge "was for good and sufficient cause and in no way motivated by an intention to retaliate . . . and that such discharge did not contravene the provisions of . . . Section 704(a) . . . ."[31]

> The Fifth Circuit Court of Appeals reversed, stating:
> [T]he Trial Court could not, during the pendency of the appeal, take action, with respect to the order then under

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[27] 42 U.S.C. § 2000e-2 (1970), *as amended*, (Supp. III, 1973).

[28] The Commission no longer honors requests for reconsideration but reserves the right to reconsider its determinations on its own motion. *See* 37 C.F.R § 1601.19d(b), (d) (1973).

[29] FED. R. CIV. P. 62(c) provides:

> When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

[30] See note 25 *supra*.

[31] 411 F.2d at 1004 n.13.

> review which would hinder or frustrate determination by the Court of Appeals. . . .
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> . . . .
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> . . . [T]he District Court should have considered the motion as ancillary to *Pettway I*. Considering that the denial of a preliminary injunction was for nearly all practical purposes the ultimate determination of Wrenn's case on the merits—maybe as to both *Pettway I* as well as *II*—we look upon it in that light, uninsulated by the usual principle that tests a grant or denial of preliminary injunctions in terms of abuse of discretion.[32]

The circuit court further found that Wrenn's request for reconsideration was a charge within the meaning of section 704(a) and was protected, notwithstanding the malicious material contained therein. In discussing the purpose of section 704(a) the court reasoned:

> In unmistakable language it is to protect the employee who utilizes the tools provided by Congress to protect his rights. The Act will be frustrated if the employer may unilaterally determine the truth or falsity of charges and take independent action.[33]

Quite clearly the court's delineation of the section's purpose was directed solely at the specific clause of section 704(a) which prohibits discrimination against one who has "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title."[34] The court properly concluded that "exceptionally broad protection" was intended for those whose actions fell within this clause.[35] The limits of the "specific clause" protection and the question of whether similar limits exist for those whose opposition is protected solely by the "general opposition clause"[36] are principal inquiries of this Article.

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[32]*Id.* at 1003.

[33]*Id.* at 1005.

[34]42 U.S.C. § 2000e-3(a) (1970), *as amended*, (Supp. III, 1973).

[35]411 F.2d at 1006 n.18.

[36]Act § 704(a), 42 U.S.C. § 2000e-3(a) (1970), *as amended*, (Supp. III, 1973) (emphasis added), provides:

> It shall be unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, *because he has opposed any practice made an unlawful employment practice by this title.*

B. *Protection of Pending Actions*

Federal courts possess inherent equitable powers to protect from reprisal litigants whose administrative or judicial actions are pending disposition.[37] Section 704(a) amplifies these powers for the benefit of Title VII charging parties. In *Drew v. Liberty Mutual Insurance Co.*,[38] the plaintiff, Ms. Drew, was fired the day after she filed charges with the EEOC accusing her employer of sex discrimination. Twelve days later she petitioned the district court on the basis of section 704(a) for an injunction restoring her former position and prohibiting future reprisal. The EEOC also complained of section 704(a) violations and joined in the action pursuant to section 706(f)(2).[39] The district court dismissed Ms. Drew's complaint on the ground that she had not complied with the jurisdictional time requirements for suit.[40] The court also found that the EEOC was a proper party and had established substantial section 704(a) violations. In Ms. Drew's challenge to the district court's dismissal of her action, the court of appeals treated her action not as one arising under section 704(a) but as one seeking "temporary relief pending the action of the Commission."[41] As such, the district court was found to have had jurisdiction to fashion an equitable remedy to protect Ms. Drew's right to invoke the administrative process. The court of appeals concluded:

> [I]n the limited class of cases, such as the present, in which irreparable injury is shown and likelihood of ulti-

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[37]*See* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 677-86 (1965).

[38]480 F.2d 69 (5th Cir. 1973).

[39]Act § 706(f)(2), 42 U.S.C. § 2000e-5(f)(2) (Supp. III, 1973), *amending id.* § 2000e-5 (1970), provides:

> Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

[40]If the Commission dismisses the charge or has neither brought suit nor entered a conciliation agreement to which the person aggrieved is a party, it must, upon demand of the aggrieved party, issue a notice of right to sue. Such notice is required prior to suit, which must be instituted within ninety days of receipt of such notice. Act § 706(f)(1), 42 U.S.C. § 2000e-5(f)(1) (Supp. III, 1973), *amending id.* § 2000e-5 (1970).

[41]480 F.2d at 73 n.5.

> mate success has been established, (here this has been determined by the trial court), the individual employee may bring her own suit to maintain the status quo pending the action of the Commission on the basic charge of discrimination.[42]

The court's reasoning followed that of Judge Higginbotham in *Pennsylvania v. Engineers Local 542*,[43] a case in which the court sought to preserve its own jurisdiction to award complete relief and to protect litigants engaged in the vindication of federal rights. In *Local 542*, White union members committed acts of violence against members of a class of Black workers involved in a pending general discrimination suit. The court found five jurisdictional bases,[44] including section 704(a), for the award of pendente lite relief and enjoined the union and its members from further acts of intimidation, retaliation or interference in any manner with a Black worker's right to institute the original suit. Significantly, the court began hearings on the motion for pendente lite relief on the same day that the assaults on the Black workers took place.[45]

Pettway, Local 542 and *Drew* irresistibly point to the conclusion that judicial action in contravention of reprisal for filing charges *may* and, to be effective, *must* be immediate. Thus, when one who "opposes" qualifies as a "charging party" and suffers retaliation for his efforts, courts should not observe the Act's ar-

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[42] *Id.* at 72.

[43] 347 F. Supp. 268 (E.D. Pa. 1972).

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> There are five alternative grounds on which plaintiffs could predicate jurisdiction on their claim for an injunction pendente lite:
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> (1) The Court's inherent power to protect federal court litigants from violence, intimidation or harassment when designed to deter use of the federal courts.
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> (2) Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., 78 Stat. 253 (1964), as amended.
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> (3) 42 U.S.Code § 1981, 16 Stat. 144, § 16 Act of May 30, 1870, Civil Rights Act of April 9, 1866, 14 Stat. 27.
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> (4) 42 U.S.C. § 1985(2), 17 Stat. 13, Act of April 20, 1871.
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> (5) 42 U.S.Code § 1985(3), 17 Stat. 13, Act of April 20, 1871.

Id. at 284-85. *But see* Tramble v. Converters Ink Co., 343 F. Supp. 1350, 1354 (N.D. Ill. 1972):

> An employer theoretically could discharge every one of its employees who makes charges against it before the EEOC irrespective of whether they are white, black or oriental. As the racial motivation which is the central crux of a § 1981 action is not necessarily involved in such a retaliatory discharge, we conclude that a discharge of an employee because of his bringing charges before the EEOC, while clearly a violation of Secton 704(a) of Title VII, is not a violation of § 1981.

[45] 347 F. Supp. at 271 n.6.

bitrary one hundred and eighty day time requirement[46] before entertaining a motion or a new action for protective relief. It is apparent that any prophylactic time requirement is totally misplaced as it relates to all section 704(a) violations. Surely one of the most efficient ways of guaranteeing detrimental effects of retaliatory action is to insulate it against countermeasures for a period of six months. Fortunately, when formal charges occasion the alleged retaliation, court-ordered relief will not be delayed because of Title VII's general time requirements. Further, the substantive principles governing the propriety of the relief sought apparently will be those of section 704(a) regardless of which jurisdictional vehicle—a motion for an injunction pending appeal, a pendente lite motion or a new cause of action—is used to present the issue to the court. This tacit acknowledgment on the part of the courts in *Pettway, Local 542* and *Drew* is clearly appropriate.

C. Section 706(f)(2)

The 1972 Amendments to Title VII in section 706(f)(2) clothed the EEOC with the power to seek "temporary or preliminary relief pending final disposition" of a charge before it.[47] The Commission has secured relief in only one such case to date, *Drew*, and then only after the original charging party sought judicial relief on her own. Theoretically, section 706(f)(2) and the Commissioner's charge device[48] provide the EEOC with a flexible and efficient vehicle for attacking reprisal actions. A problem of effecting any kind of Commission action in this respect, however, exists within the Commission itself. As the Fifth Circuit Court of Appeals accurately noted in *Drew*, the Commission has neither the time nor the mechanisms for identifying and prosecuting reprisal actions requiring immediate attention.[49] Until the EEOC finds the time and creates those mechanisms, section 706(f)(2) will remain an infrequently used remedy. Regardless of how often this remedy is used, the Fifth Circuit seems correct in its holding that section 706(f)(2) neither preempts nor destroys the ability of private litigants to

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[46]See note 25 *supra*.

[47]42 U.S.C. § 2000e-5(f)(2) (Supp. III, 1973), *amending id.* § 2000e-5 (1970).

[48]Act § 706(b), 42 U.S.C. § 2000e-5(b) (Supp. III, 1973), *amending id.* § 2000e-5 (1970), authorizes the institution of charges by a member of the Commission. The 1972 Amendments deleted the original requirement that the Commissioner's charges could issue only after the Commissioner first made a determination of reasonable cause and set forth the facts upon which the charge was based. Act of July 2, 1964, Pub. L. No. 88-352, § 706(a), 78 Stat. 241.

[49]480 F.2d at 74.

invoke the inherent equitable powers of federal courts to redress reprisal actions.[50]

III. Establishing a Prima Facie Violation

The elements of a section 704(a) violation are clearly set forth in the statute. The complaining party must establish that he has *opposed employment discrimination, or* that he has *made a charge or participated in a proceeding* in which an employment practice is alleged to be unlawful pursuant to Title VII. The complainant must further establish that he has been made the object of *discrimination by the respondent,* and that the discrimination took place *because of* the complaint's opposition, charge or participation. Too often courts and the EEOC, through its administrative decisions, have failed to make findings with respect to each element of the alleged violation. As a result, the parameters of the elements, with the possible exception of "charging" or "participating," have remained blurred. This failure has also led to the erroneous confusion of the principles which should govern the establishment of a prima facie violation with those which should be confined to permissible defenses.

A. Challenging Discrimination

1. Charges and Participation

The clearest and most easily recognized form of opposition to practices thought to be unlawfully discriminatory is the filing of formal charges with an administrative agency or court. All of the allegations, arguments and surplusage contained in a document or communication purporting to be a charge are merged into the liberal definition of a charge for purposes of section 704(a) protection. In the words of the Fifth Circuit Court of Appeals in *Pettway:*

> The Employee is not stripped of his protection because he says too much. If he says enough the Employee can suffer no detriment by virtue of having filed charges with EEOC which also contain false or malicious statements. By utilizing EEOC machinery he is exercising a protected right.[51]

The *Pettway* court specifically left open the question of whether a defective charge would be protected. The broad purposes of Title VII, its enforcement scheme and section 704(a), however, would seemingly dictate that a defective charge should also be protected.

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[50] *Id.* at 75-76.

[51] 411 F. 2d at 1007.

In section 704(a) cases, no purpose would be served by distinguishing between writings that are cognizable as charges and those that are not. The Commission must accept charges based upon the mere belief that discrimination exists. If employees are to be encouraged to act upon their beliefs and to utilize an appropriate vehicle for redress, their intention to charge should govern. Also, an employee's filing of a writing or communication with the EEOC is a definitive expression of his intent to file a charge. Even if a writing does not qualify as a charge, it should nevertheless constitute "opposition" within the meaning of section 704(a)'s general opposition clause. This approach, however, may yield less definitive protection.

A similar problem is posed when a "charging party" publicly reveals the content of his charge. The confidentiality requirements of Title VII[52] were an important consideration in the protection of the alleged malicious material in *Pettway*. The failure to honor the premium that the Act places upon confidentiality—though arguably inapplicable to the charging party[53]—might logically result in a court's treating a charge containing *malicious material* or *disparaging comments* under the general opposition clause. This problem might be compounded by the fact that statements contained in the publicized charge may be actionable in state courts.[54] If the

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[52]Act § 706(b), 42 U.S.C. § 2000e-5(b) (Supp. III, 1973), *amending id.* § 2000e-5(b) (1970), provides:

> If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

Act § 709(e), 42 U.S.C. § 2000e-8(e) (1970), provides:

> It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commisson pursuant to its authority under this section prior to the institution of any proceeding under this title involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year.

[53]*Cf.* H. Kessler & Co. v. EEOC, 472 F.2d 1147 (5th Cir. 1973).

[54]*See* EEOC Decision No. 74-77, Jan. 18, 1974, in 2 CCH EMPL. PRAC. GUIDE ¶ 6417 (1974), in which the Commission specifically left open this question when the charged employer filed a cross-claim against the charging party's state court suit for breach of contract. In holding that the employer's

charge contains only a bare allegation of discrimination, no sound reasons exist for treating a publicizing employee differently from a nonpublicizing employee, notwithstanding possible confidentiality requirements. The Commission's processes cannot operate in a vacuum. The existence of a charge will eventually become known generally in the working environs where an effective investigation is taking place after notice to the respondent. Thus, an employee's publication of a charge containing no malicious or extraneous material works no additional hardship upon the respondent and in no way impedes the administrative enforcement of the Act. Accordingly, there appear to be no significant reasons for denying the publicizing charging party the absolute protection afforded those who do not publicize. The Act's general confidentiality requirements should not be construed to compromise a substantive right specifically protected by section 704(a).

Drew, Local 542 and *Pettway* establish a firm judicial policy of protecting Title VII litigants who are seeking federal administrative or judicial relief from employment discrimination.[55] That policy should extend identical federal court protection to persons who have administrative actions pending in state antidiscrimination deferral agencies;[56] those agencies attain such status only by virtue of Title VII and are part of the overall enforcement scheme of federally established rights.[57] Thus, in theory and in fact, a complaint lodged with a state deferral agency is a charge with the EEOC at the time of filing. For these reasons section 704(a) should proscribe retaliation for invoking or participating in the process of these state deferral agencies.[58] The EEOC has gone even further and has held

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cross-claim, based upon the charge filed with the EEOC, was proscribed by section 704(a), the Commission reasoned that:

> [T]he filing of a charge of unfair employment practices with the Commission carries with it a privilege broad enough to proscribe the bringing of a libel action against the person filing the charge, unless he or she publishes the alleged libel to other than Commission officials or employees.

[55]The Commission has been equally diligent in the protection of charging parties. *See* EEOC Decision No. 70-661, Mar. 24, 1970, in CCH EEOC Decisions ¶ 6138 (1973); EEOC Decision No. 71-2338, June 2, 1971 in CCH EEOC Decisions ¶ 6247 (1973).

[56]When a charge is filed alleging an unlawful employment practice in a state which "has a state or local law prohibiting the unlawful employment practice alleged and establishing or *authorizing a state or local authority* to grant or seek relief from such practice," the Commission must defer to the appropriate authority or agency for a period of sixty days or until final action is taken by the agency, whichever is earlier. Act § 706(c), 42 U.S.C. § 2000e-5(c) (Supp. III, 1973), *amending id.* § 2000e-5(c) (1970) (emphasis added).

[57]*See* 37 C.F.R. § 1601.12 (1973).

[58]*See* EEOC Decision No. 70-683, Apr. 10, 1970, in CCH EEOC Decisions ¶ 6145 (1973).

that persons complaining to nondeferral state agencies of practices which would be unlawful pursuant to Title VII are no less deserving of section 704(a) protection than are those who file charges with the EEOC.[59]

It is obvious that the Commission and the courts would be hamstrung in their enforcement responsibilities if potential witnesses could be coerced into silence. Accordingly, the Commission and the courts appear most willing to extend the protection of section 704 (a) to broad categories of "participation" in Commission or court proceedings brought under Title VII.[60] The Commission has held in one of the few prospective applications of section 704(a) that employer rules which advise "employees not to cooperate with any government investigation without first obtaining" company permission are designed to coerce employees and to inhibit the free assistance and participation of employees in the Commission's processes.[61] Likewise, under this theory any employer attempt to tailor the character of employee testimony would appear to be inherently destructive of free employee participation. The EEOC has found a section 704(a) violation in such a situation, but only after the respondent employer had begun specific acts of retaliation against the employee whom it had been unable to control.[62]

2. *"General Opposition"*

The "general opposition" clause of section 704(a) forbids retaliation against those who oppose practices made unlawful by Title VII. In *Green v. McDonnell-Douglas Corp.*,[63] an employer refused to rehire plaintiff Green, a Black mechanic, because of his opposition to the employer's allegedly discriminatory policies. Prior to 1964 Green had complained persistently to McDonnell officials of the imminency of a layoff induced by work reduction. When the

[59]*See* EEOC Decision No. 70-661, Mar. 24, 1970, in CCH EEOC Decisions ¶ 6138 (1973), in which the Commission found that an employer's harassment of a female employee who sued for back wages under Pennsylvania's Equal Pay Act violated section 704(a).

[60]*See* EEOC v. Plumbers Local 189, 311 F. Supp. 464 (S.D. Ohio 1970) (union attorney's inherently coercive questioning of witnesses at job site); EEOC Decision No. 71-2312, June 1, 1971, in CCH EEOC Decisions ¶ 6243 (1973) (harassment and forced resignation because of witness' failure to follow supervisor's order to fabricate statements to investigator in exculpation of employer); EEOC Decision No. 71-1151, Jan. 14, 1971, in CCH EEOC Decisions ¶ 6208 (1973) (charging party 'interviewed" in presence of seven managerial officials).

[61]Unpublished EEOC Decision No. 72-0299.

[62]EEOC Decision No. 71-2312, June 1, 1971, in CCH EEOC Decisions ¶ 6248 (1973).

[63]318 F. Supp. 846 (E.D. Mo. 1970), *rev'd*, 463 F.2d 337 (8th Cir. 1972), *vacated and remanded*, 411 U.S. 792 (1973).

layoff materialized in 1964, Green initiated protests by writing letters, filing charges, picketing and by various other means. He also spearheaded demonstrations aimed at McDonnell's employment practices, including a traffic "stall-in" during a shift change which resulted in the blockage of a main access route to the McDonnell plant. Green was also at least tangentially involved in a "lock-in" demonstration at the main office building in which the front doors were chained and padlocked during office hours. He was cited for and pleaded guilty to obstruction of traffic in connection with the "stall-in."

Green filed suit in federal district court and alleged that McDonnell's refusal to rehire him was racially motivated and was made in retaliation for his opposition to discriminatory employment practices. The district court's confused treatment of the difficult section 704(a) issues began with its framing of those issues: "(1) whether the plaintiff's *misconduct* is sufficient to justify defendant's refusal to rehire, and (2) whether the 'stall-in' and 'lock-in' are the *real reasons* for defendant's refusal to rehire the plaintiff."[64]

The court had a problem. Section 704(a) protects opposition to unlawful employment practices. Conduct construed in normal circumstances to be misconduct may nevertheless constitute opposition within the meaning of section 704(a) and may ultimately be deserving of its protection. By assuming that Green's actions were misconduct unprotected by section 704(a), the court rendered its second issue superfluous. Under the court's initial formulation there was, in fact, nothing in Green's conduct deserving protection. The "real reason" for the refusal to rehire, whatever it might have been, was of no moment in securing the protection of section 704(a) since Green was not "opposing" within the meaning of the section.

While this rather confusing issue formulation did not prevent the court from engaging in a more reasoned analysis of the case, it did lead to a rather unreasonable holding:

> [D]efendant's reasons for refusing to rehire plaintiff were motivated solely and simply by the plaintiff's participation in the "stall-in" and "lock-in" demonstrations. The *burden of proving other reasons was on the plaintiff*.[65]

Indeed, Green must have felt under some handicap when asked to disprove his own case.

The decision in *Green* is not without its redeeming aspects. The court at least attempted, though in conclusionary fashion, to define the permissible limits of the protection afforded those who oppose:

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[64]318 F. Supp. at 850 (emphasis added).

[65]*Id.* (emphasis added).

> Protest must be kept within reasonable limits if it is to be protected. Impeding the flow of traffic into or from an employer's plant exceeds such reasonable limits. Title VII of the Civil Rights Act of 1964 does not protect such activity as employed by the plaintiff in the "stall-in" and "lock-in" demonstrations. . . .
>
> . . . The Court finds that conduct such as the plaintiff's, which creates situations fraught with danger to other employees or to the general public, is not protected by Title VII. . . .
>
> . . . The purpose of the Act is to secure effective redress of employees' rights, to secure for them the right to exercise their lawful civil rights without discrimination because of this exercise, not to license them to commit unlawful or tortious acts or to protect them from the consequences of unlawful conduct against their employers.[66]

One can hardly question these characterizations. A problem develops, however, in construing their applicability to the section 704(a) situation. Did all or some of Green's actions constitute "opposition"? Did McDonnell treat Green differently from other similarly situated nonopposing parties? If so, was that treatment motivated by Green's "opposition"? Finally, was McDonnell perhaps justified in its treatment of Green because of particular reasons inextricably bound to the character or quality of the opposition which, in some circumstances, would be deserving of protection?

The factual pattern in *Green* provided the district court with an ideal vehicle for the establishment of definitive principles governing resolution of issues arising under the general opposition clause of section 704(a). The court missed this opportunity as did the Eighth Circuit when it disposed of the section 704(a) issue on appeal[67] by merely concluding that the protection of section 704(a) extended to lawful "protests" in the same manner as the filing of charges but that no protection is extended "to activities which run afoul of the law."[68] Such cursory treatment does little to enhance the section's potential for extending effective protection to the opposing worker. The concept of opposition, unlike the terms "charges" and "participation," is not easily defined. Yet in many cases the fact of opposition, its form and its substance are ignored by courts. Because the fact of opposition is the initial element in

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[66]*Id.* at 850-51.

[67]Green v. McDonnell-Douglas Corp., 463 F.2d 337 (8th Cir. 1972), *vacated and remanded*, 411 U.S. 792 (1973).

[68]463 F.2d at 341.

establishing a section 704(a) violation, its definition in each case is crucial.

a. The Easy Case

Certain classes of employee actions are easily defined as "opposition"[69] within the meaning of section 704(a). Among these are concerted actions as typified by *Green*. In addition, "opposition" clearly encompasses such activities as picketing,[70] filing of formal discrimination-based grievances under a collective bargaining agreement,[71] complaining about one's treatment to employers and collective bargaining representatives,[72] and filing section 703 administrative or civil actions.[73] Such actions obviously constitute "opposition" since the intention of the parties to oppose Title VII discrimination is usually discernible from the act of opposition. Likewise, there is little chance in such a case that the employer or union charged with the section 704(a) violation could effectively challenge the existence of an employee's intent to oppose, notwithstanding employer or union disagreement with the propriety and form of opposition.

b. The Difficult Case

The burden of proving intent to oppose takes on a more difficult but crucial function in other contexts. An employee's decision to oppose may have been the result of painstaking calculation, but

[69]"Opposition" is used throughout the remainder of the Article to denote employee actions which fall within the "general opposition" clause of section 704(a). See note 36 *supra*.

[70]*See* EEOC Decision No. 71-1804, Apr. 19, 1971, in CCH EEOC Decisions ¶ 6264 (1973) (one-man picket opposing alleged racially discriminatory employment practices protected by section 704(a) from dismissal despite valid no strike clause); *cf.* Western Addition Commun. Organ. v. NLRB, 485 F.2d 917 (D.C. Cir. 1973), *cert. granted*, 415 U.S. 913 (1974).

[71]*See* EEOC Decision, May 28, 1969, in CCH EEOC Decisions ¶ 6039 (1973); *cf.* EEOC Decision No. 71-1551, Mar. 30, 1971, in CCH EEOC Decisions ¶ 6246 (1973) (employee's contractual rights under a collective bargaining agreement are concurrent with right to proceed against employer under Title VII).

[72]*See* Johnson v. Lillie Rubin Affiliates, 5 CCH Empl. Prac. Dec. ¶ 8542 (M.D. Tenn. 1973) (employee discharged for complaining to NAACP about employer's discriminatory practices); EEOC Decision, May 28, 1969, in CCH EEOC Decisions ¶ 6039 (1973) (employee discharged for complaining to his employer and filing grievances with his union objecting to racial epithets); EEOC Decision No. 71-1545, Mar. 30, 1971, in CCH EEOC Decisions ¶ 6261 (1973) (continued job tenure conditioned upon employee's ceasing "pestering for equal rights").

[73]*See* Barela v. United Nuclear Corp., 317 F. Supp. 1217, *aff'd*, 462 F.2d 149 (10th Cir. 1972).

spontaneity or timidity on the part of the employee may produce a form of opposition which masks that intent.

Company policies and procedures and direct orders of supervisors are often discriminatory. An aggrieved worker or other concerned employees sometimes violate these policies or orders because of their discriminatory content. Such deliberate violations may constitute "opposition" within the meaning of section 704(a).[74] Obviously an employee's burden of demonstrating that he was "opposing" should be a heavy one since section 704(a) was not intended to serve as an excuse for employee recalcitrance. An opposing employee should be required to demonstrate that the policy or order disobeyed was at least superficially discriminatory, that he had knowledge of the discriminatory effect, and that his participation would victimize or implicate him in the discriminatory action. For example, an employment applicant may question or refuse to take a battery of tests required as a condition for employment. The knowledge, long extant in minority communities, that testing devices are often instruments of discrimination should be enough to bring the applicant's *questioning* of the test's validity within the ambit of "opposition" for the purposes of section 704(a) protection.[75] That knowledge, coupled with the employer's poor image for minority employment or promotion, should satisfy the "opposition" burden for even a refusal to take the test.[76] Satisfaction of this burden, however, is insufficient to prove that an employee's questioning of or refusal to submit to a test resulted in a retaliatory action.

Clearly all that the applicant has proven thus far is that his actions constituted "opposition" within the meaning of the Act. He has not proven that his questioning of or refusal to submit to the test resulted in a retaliatory action, nor has the employer been given the opportunity to demonstrate that his own response was justified, as when the actions of the opposing applicant were unreasonable in view of existing mechanisms for exercising opposition. These and other issues must be addressed prior to any finding that 704(a) has been violated, but only after it has been concluded that "opposition" has occurred within the meaning of the Act. In merging the issues the Commission and the courts open the door to gross

[74]*See* EEOC Decision No. 70-601, Mar. 9, 1970, in CCH EEOC Decisions ¶ 6124 (1973) (employee refused a work assignment made in retaliation for his filing of charges against the employer).

[75]*Cf.* O'Brien v. McGuire, Mass. Comm'n Against Discrimination Decision No. 73-EMP-294-S, Oct. 12, 1973, in 2 CCH EMPL. PRAC. GUIDE ¶ 5196 (1973) (tenure denied for inquiry into basis of possible adverse action).

[76]*See* EEOC Decision No. 74-33, Sept. 28, 1973, in 2 CCH EMPL. PRAC. GUIDE ¶ 6406 (1973) (suspension for refusal to take discriminatory test violates section 704(a)).

oversimplification and fail to provide guidance to opposing parties or to potential respondents.

The Eighth Circuit's reasoning in *Green* that section 704(a) did not protect "protests" which "run afoul in the law"[77] is an excellent illustration of a court's oversimplification of the issues. Practical as well as substantive problems are inherent in this characterization. For example, lying about one's arrest record on public employment application forms may constitute a criminal offense. On the other hand, seeking or using certain criminal record information is unlawful under Title VII.[78] Therefore, when a public employer refuses to process the application of or hire an otherwise qualified applicant who has lied on his application form, the refusal is directed at a form of "opposition" as well as at the "unlawfulness" of the applicant's action. Indeed, the form of opposition may eventually prove undeserving of protection under section 704(a), but to base such a decision ab initio upon the mere unlawfulness of the act would sanction the continued existence of the original discrimination.

Peacefully protesting employees may raise similar issues by their violation of state statutes which prohibit criminal trespass, disturbance of the peace, and unlawful assembly. The price that opposing employees seem willing to pay for the elimination of discriminatory practices has historically included penalties for violation of such statutes and ordinances. In fact, it was such protests which brought about the enactment of Title VII. It would be anomalous now to view the peaceful protests of workers as something less than opposition within the meaning of section 704(a) merely because they committed technical violations of municipal ordinances or state laws. Furthermore, the function of determining the existence of a criminal act would unjustifiably fall upon the employer since the decision on the question of employee or applicant discipline would almost always precede an adjudication of lawfulness. The Eighth Circuit's blanket exemption of "criminal" acts from the protections of section 704(a) thus goes too far. Its application to the testing example is both illogical and violative of substantial federal interests which are embodied in section 704(a). In this situation the criminal act was occasioned by a discriminatory demand. Equally illogical results would obtain in the application of the exemption of peaceful protests "which run afoul of the law."

Threatening to oppose discriminatory acts, either by filing formal complaints or by engaging in forms of concerted activity,

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[77] 463 F.2d at 341.

[78] *See* Gregory v. Litton Systems, Inc., 472 F.2d 631 (9th Cir. 1972); *cf.* Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), *modified en banc*, 452 F.2d 327 (8th Cir.), *cert. denied*, 406 U.S. 950 (1972).

may also constitute "opposition" within the meaning of section 704(a).[79] Constant generalized threats obviously serve no useful purpose and are undoubtedly disruptive of morale and efficiency. On the other hand, threatening to oppose discriminatory practices, if performed judiciously, is a reasonable negotiating technique which can yield progressive institutional change without the necessity of outside assistance. As in the case of violations of company rules,[80] the determination of which threats are deserving of section 704(a) protection must ultimately rest upon the balancing of institutional interests against the interests of federal policy in protecting "opposing" employees or applicants. But since the Act protects "opposition" and not mere threats, the threshold question must be: Does the threat constitute "opposition" within the meaning of section 704(a)? Again, the intention of the protesting party should be the determinative factor.

In some contexts the mere assertion of rights—one's own or those of others—takes on the mantle of "opposition." Examples are legion: the minority applicant who bids for a formerly White job, the White worker who refers Blacks to or assists them in securing a job formerly held by Whites, female workers who organize for purposes of group discussion or mutual self-help, or females or minorities who run for union office.

Employees engaging in such activities may have only a suspicion that their employer or union is unlawfully discriminating, or they may have no knowledge in this respect. By their actions employees merely intend to assert rights consistent with principles of nondiscrimination.[81] But, in the minds of some unions and employ-

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[79] *See* EEOC Decision No. 6247, Sept. 28, 1973, in CCH EEOC Decisions ¶ 6247 (1973).

[80] See text accompanying notes 74-78 *supra.*

[81] *See* EEOC Decision No. 71-345, Oct. 13, 1970, in CCH EEOC Decisions ¶ 6167, at 4,280 (1973), in which a White employee was discharged for referring a Black friend to the employer. The Commission reasoned that:

> [I]f Charging Party's referral was interpreted by Respondent as opposition to or interference with its policy of refusing to hire Negro females, and if Respondent retaliated against her because it viewed her action in this light, then Charging Party was discharged "for opposing practices made unlawful by Title VII" in violation of Section 704(a) whether or not she either knew of Respondent's policy or intended to oppose it.

EEOC Decision No. 71-2040, June 3, 1971, in CCH EEOC Decisions ¶ 6275 (1973) (female employee lost overtime because she asked to be upgraded); *cf.* EEOC Decision No. 71-1850, Apr. 21, 1971, in CCH EEOC Decisions ¶ 6245 (1973) (White union organizer forced into resignation because of harrassment resulting from his participation in civil rights demonstrations in the area); EEOC Decision No. 72-1704, Apr. 26, 1972, in CCH EEOC Decisions ¶ 6365 (1973) (notation placed in the charging party's personnel file indicat-

ers, those who assert such rights appear as "trouble-makers" and "militants." In such circumstances, the assertions of employees seeking their rights become opposition to those who would retaliate. It should be treated as such by the courts.

There is another and perhaps more fundamental reason for viewing such assertions as "opposition" within the meaning of section 704(a): peers may view them as such. The chilling effect upon similarly situated employees is not diminished because a class member is disciplined for the assertion of rights rather than for opposing under section 704(a). Indeed, it is probable that the chill would harden to a deep-freeze of all rights-seeking when unremedied retaliation is the expectation.

Although the parameters of "opposition" suggested above are broad, one must not forget that "opposition" is nothing more than a response to perceived discrimination. The varieties of discrimination for which redress is sought are countless. The ultimate temperance of acts made in opposition to discriminatory practices can only be made in reference to the environment and to the exigencies of the situation in which they arise. Such an inquiry is misplaced, however, at this stage. If the courts are to avoid the traps of overly restrictive definitions of "opposition" and to protect the inclination to oppose as well as the form of opposition, they must first determine whether any opposition has occurred. Most important, this determination should be made without regard to the propriety of the form of opposition. Only in this sense may the suggested parameters of "opposition" be said to be broad—but necessarily so.

B. Retaliation

There are two additional elements in the establishment of a prima facie violation of section 704(a). The plaintiff must first demonstrate that the defendant employer or union has *discriminated* against him. Secondly, the plaintiff must show that he was discriminated against *because of* his "opposition." Together, these two elements require a finding that the respondent employer or union has engaged in intentional discrimination against an opposing party. The definition of intentional discrimination has been established in decisions striking down the White primary,[62] discriminatory jury selection,[63] and public school segregation.[64] Its founda-

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ing that charging party copied address from equal employment opportunity poster).

[62] *See* Smith v. Allwright, 321 U.S. 649 (1944).

[63] *See* Norris v. Alabama, 294 U.S. 587 (1935); Strauder v. West Virginia, 100 U.S. 303 (1880); *cf.* Swain v. Alabama, 380 U.S. 202 (1965).

[64] *See* Brown v. Board of Educ., 347 U.S. 483 (1954).

tion lies in the concept of unequal or disparate treatment of similarly situated persons.

Proof of disparate treatment is particularly difficult for opposing parties because discrimination arising under section 704(a), unlike section 703, is not by nature class discrimination.[65] Typically the section 704(a) discriminatee is "out there by himself," highly visible and particularly vulnerable. This does not mean, however, that the opposing party's status as an object of retaliation is devoid of class considerations. Indeed, he is concerned with protecting class interests. Generally, however, section 704(a) discrimination is sporadic and highly individualized, even when used to undermine the prospective opposition of large numbers of employees.[66] Thus, there is little or no possibility to prove gross statistical disparities between identifiable classes of opposing or nonopposing employees or applicants capable of supporting a finding of disparate treatment. This fact also explains why disparate effect,[67] a section 703 class based concept, is not utilized in section 704(a) cases. However, if the Commission and the courts are to protect the interests of opposing parties and those similarly prone, diligence and understanding in the discovery of section 704(a) retaliation must match that exhibited in the proscription of section 703 discrimination.

1. Disparate Treatment: The "Discrimination" Element

Two comparative inquiries are basic to the issue of whether section 704(a) "discrimination" has occurred: Was the opposing party treated differently than similarly situated employees or, alternatively, did the employer's treatment of the opposing party change after his registry of opposition? It is clear, however, that in some circumstances the inquiry cannot end here. Uniformly applied company rules may unreasonably impede opposition, and com-

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[65] *See* Francis v. American Tel. & Tel. Co., 55 F.R.D. 202 (D.D.C. 1972).

[66] *See* United States v. Hayes Int'l Corp., 7 CCH Empl. Prac. Dec. ¶ 9164 (N.D. Ala. 1973) (disparate treatment not shown in discharge of one of many Black plaintiffs in former Title VII suit); Pennsylvania v. Engineers Local 542, 347 F. Supp. 268 (E.D. Pa. 1972).

[67] *See* Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1971):

> What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification. . . . [G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability. . . . Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.

pany or union actions in such circumstances may be inherently destructive of the right to oppose or participate.

In *EEOC v. Plumbers Local 189*,[88] Black plumbers who had filed affidavits in a pending racial discrimination suit against the union were questioned under oath by the union's attorney. The questioning took place in a trailer at a construction site in the presence of a stenographer and the union's business agent. Alleging violations of section 704(a), the EEOC moved to strike the elicited testimony proffered by the union at the trial. The court sustained the motion to strike and reasoned that:

> However subtle they may be, the psychological pressures exerted upon these individuals, in view of the total power held jointly by the respondent union and the employer over their present and future job prospects, leads this Court to the inescapable conclusion that *the circumstances under which these conversations were held were coercive by their very nature* and any statement made during this course thereof cannot be said to be truly voluntary.[89]

Questions concerning the union's treatment of similarly situated, nonparticipating or nonopposing members correctly have no place in measuring section 704(a) violations in such circumstances. Thus, at least when the rights to participate or to oppose through administrative or court proceedings are at issue, respondents may not be permitted to engage in "*conduct which would tend to infringe* on that right to be practiced with impunity."[90]

In virtually all other contexts the discrimination element must be established by either of the two comparative inquiries stated above.[91] In other words, the worker who complains of a section 704(a) violation must be able to demonstrate a difference between the pre-opposition and post-opposition treatment afforded him. In the alternative he may carry his burden of proof on this element by establishing a difference in the respondent's post-opposition treatment of himself and that afforded nonopposers. Because the gravamen of a section 704(a) action is retaliation and not race or sex bias, the class of "nonopposers" may, and probably will, include women and minorities. This fact should not weaken the opposing party's claim of retaliation.

However, the opposing party may be faced with a more difficult problem of proof when his opposition has been combined with that of many other workers who claim to have suffered no

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[88] 311 F. Supp. 464 (S.D. Ohio 1970).

[89] *Id.* at 466 (emphasis added).

[90] *Id.* at 467 (emphasis added).

[91] *But see* discussion of "chilling effect" doctrine in indirect proscriptions of the right to oppose. Notes 104-11 *infra* & accompanying text.

section 704(a) discrimination.[92] In this situation, it might appear reasonable to compare only the treatment afforded the section 704(a) opposing party and that afforded other opposing parties.[93] Certainly such a comparison is probative of the discrimination issue as well as the issue of whether the discrimination was *because of* the charging party's opposition. However, to limit the inquiry to such a narrow focus would open the door to selective retaliation among opposers, an evil no less invidious and no less capable of stifling dissent than wholesale reprisal. Accordingly, the disparate treatment inquiry should consistently compare the treatment of the charging party to that of the class of nonopposers and should compare the differences in treatment afforded the charging party before and after his opposition.

The usual forms of discrimination generally proscribed by the Act[94] are well known and need no elaboration here. However, there are forms of discrimination peculiar to section 704(a) which deserve mention. These include indirect proscriptions of the right to oppose and the manufacture of reasons for discipline.

a. Indirect Proscriptions

Some significant attacks upon the right to oppose appear, at first blush, to be no more than normal and permissible exercises of labor-management prerogatives. For instance, why should a union not be permitted to condition its representation of a Black member's failure-to-promote grievance upon his withdrawal of an employer-directed charge of discrimination previously filed with a state fair employment practices commission?[95] Why may not an employer consider an applicant's pending discrimination charge against a former employer in making a hiring determination? Certainly a union has the discretion not to expend its resources in support of certain grievances.[96] Likewise, employers have a

[92] *See* United States v. Hayes Int'l Corp., 7 CCH Empl. Prac. Dec. ¶ 9164 (N.D. Ala. 1973).

[93] *Id.* (no section 704(a) discrimination on the facts presented).

[94] *See* Act § 703(a)-(c), 42 U.S.C. § 2000e-2(a)-(c) (1970), *as amended*, (Supp. III, 1973).

[95] *See* EEOC Decision No. 71-1551, Mar. 30, 1971, in CCH EEOC Decisions ¶ 6246 (1973) (union suspended action on opposing party's grievance when it learned that he had filed a charge with the Fair Employment Practices Commission upon the same subject matter); EEOC Decision No. 71-2338, June 2, 1971, in CCH EEOC Decisions ¶ 6279 (1973).

[96] *Compare* Humphrey v. Moore, 375 U.S. 335 (1964), *with* Conley v. Gibson, 355 U.S. 41 (1957):

> The Railway Labor Act, in an attempt to aid collective action by employees, conferred great power and protection on the bargaining agent chosen by a majority of them. As individuals or small groups the employees cannot begin to possess the bargaining power of their

right to condition employment upon their assessment of an applicant's commitment to the employment opportunity. The legitimate discrimination permitted in such circumstances and the impermissible discrimination prohibited by section 704(a) are separable, if at all, by a fine line which is only discernible in many instances by an examination of the effects of employer actions.

Barela v. United Nuclear Corp.[97] squarely represents the dilemma faced by the employer. Plaintiff Barela, a Mexican-American, sought work with defendant, United Nuclear. The position sought was vacant and there was no question that Barela was qualified. During the job interview the defendant's personnel officer discovered that Barela had filed a charge of national origin discrimination with the EEOC against his former employer. The defendant's representative then asked Barela if he intended to pursue the pending charge to its conclusion and, if successful, whether he intended to resume his former employment. Upon receiving an affirmative response, the personnel officer informed Barela that his application would not be processed further, since the defendant was seeking only permanent employees. Barela returned later that day to inquire whether he would be hired if he dropped his pending charge.[98] The defendant's representative refused to process the application further and indicated that Barela's charge against his former employer must be disposed of first.

> The issue, as framed by the district court, was whether defendant's refusal to further process plaintiff's application and hire him . . . was based upon the personnel manager's honest belief that the plaintiff was only seeking interim employment or whether the refusal to hire plaintiff was simply because he had filed with the E.E.O.C. a charge against another employer. The latter reason would amount to a violation of 42 U.S.C.A. § 2000e-3(a).[99]

Based upon this formulation the court found that the defendant's first refusal to process the application was permissible but that

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representative in negotiating with the employer or in presenting their grievances to him. Nor may a minority choose another agent to bargain in their behalf. We need not pass on the Union's claim that it was not obliged to handle any grievances at all because we are clear that once it undertook to bargain or present grievances for some of the employees it represented it could not refuse to take similar action in good faith for other employees just because they were Negroes.

Id. at 47.

[97]317 F. Supp. 1217, *aff'd*, 462 F.2d 149 (10th Cir. 1972).

[98]In the interim Barela asked the EEOC whether he could drop his charge of discrimination against his former employer. 317 F. Supp. at 1218.

[99]*Id.*

the second failure violated section 704(a) since Barela had made clear that he was willing to drop the charge and that he was seeking permanent employment.

The court's characterization of the issue, its failure to determine whether discrimination existed, and its apparent insistence that retaliatory motives provide the only basis for the refusal to hire inevitably resulted in a practical obliteration of the section 704(a) protection. The only basis for finding a violation was Barela's willingness to abandon his original charge, exactly what section 704(a) was designed to prevent.

The Tenth Circuit Court of Appeals affirmed, reasoning that:

> Factually the case boils down to United Nuclear's agent . . . telling the plaintiff that notwithstanding his qualifications for the vacancy his application could not be processed until there was no longer a dispute between him and [his former employer] . . . . The trial court was faithful to the evidence and legally correct in recognizing that the filing of a charge is a protected right under the Act and that *conduct infringing the right* is a violation of the Act. With respect to the asserted need for permanent employees and its relation to the need for refusing employment to Title VII claimants, the business necessity defense of United Nuclear was not established.[100]

The thrust of this decision, despite its affirmance of the district court's decision in its entirety, was obviously aimed at the defendant's *original* failure to process the application. Such reasoning, if applied to the second refusal, would be superfluous.

What recourse is available to an employer seeking permanent employees? Does he discriminate within the meaning of section 704(a) when he refuses employment to a Title VII claimant qualified for the position sought? Depending upon the employer's course of conduct there are two bases for answering in the affirmative. First, employers would almost invariably engage in disparate treatment by denying an applicant a position because of a pending Title VII action. Employers generally seek no guarantee that new employees remain on the job for a specified number of years, and job turnover is anticipated. The contingencies which lead persons to change employment cannot be anticipated. Recovery in a pending Title VII action is such a contingency. In singling out Barela's status as a Title VII claimant, United Nuclear applied a condition of continued job tenure which it could not and did not apply to the contingencies existing for all other applicants, that is, persons who might move to another area of

[100]Barela v. United Nuclear Corp., 462 F.2d 149, 152 (10th Cir. 1972) (emphasis added and citations omitted).

the country or persons who might abandon their employment for personal reasons. In this sense United Nuclear engaged in classic discriminatory treatment, beginning with its *first refusal* to process Barela's application.

Another basis exists upon which the discrimination element may be established in this setting. The court of appeals in *Barela* held that "conduct infringing" the right to file a charge establishes a prima facie violation of section 704(a). Administrative decisions of the EEOC support this view.[101] The "infringement" theory appears to parallel the "discriminatory effect" theory[102] established in *Griggs v. Duke Power Co.*[103] However, "infringement" is best understood as a variant of the "chilling effect doctrine."[104]

Fundamental constitutional rights are protected from the "chilling effect" of discretionary state action.[105] The focus of the doctrine is upon both the individual who seeks to exercise a fundamental right and the class with whom he is associated. Thus, state instituted loyalty oaths,[106] libel laws,[107] and residency requirements for recipients of welfare benefits[108] have been proscribed when their operation has a "chilling effect" upon the exercise of fundamental constitutional rights. The doctrine was extended to the labor relations context in *Textile Workers v. Darlington Manufacturing Co.*,[109] in which the Supreme Court held that an employer's partial closing of an enterprise "is an unfair labor practice under § 8(a)(3) if motivated by a purpose to chill

[101] *See, e.g.*, EEOC Decision No. 71-1151, June 1, 1971, in CCH EEOC Decisions ¶ 6208 (1973) ("unnatural formality" tending to intimidate charging party created by his "interview" by seven company officials); EEOC Decision No. 71-2338, June 2, 1971, in CCH EEOC Decisions ¶ 6279 (1973) ("Foreseeable effect" of union's failure to process grievance identical to member's state FEPC charge was to stifle the filing of such charges).

[102] See notes 86-88 *supra* & accompanying text.

[103] 401 U.S. 424 (1971). See note 87 *supra*.

[104] *See* Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808 (1969).

[105] *See* Walker v. City of Birmingham, 388 U.S. 307, 338 (1967) (Brennan, J., dissenting):

> To give these freedoms the necessary "breathing space to survive" . . . the Court has modified traditional rules of standing and prematurity. . . . We have molded both substantive rights and procedural remedies in the face of varied conflicting interests to conform to our overriding duty to insulate all individuals from the "chilling effect" upon First Amendment freedoms generated by vagueness, overbreadth and unbridled discretion to limit their exercise.

Id. at 344-45. *See also* Laird v. Tatum, 407 U.S. 567 (1972).

[106] Wiemer v. Updegraff, 344 U.S. 183 (1952).

[107] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[108] Shapiro v. Thompson, 394 U.S. 618 (1969).

[109] 380 U.S. 263 (1965).

unionism in any of the remaining plants of a single employer and if the employer may reasonably have foreseen that such closing will likely have that effect."[110]

The "fundamental rights" in the Title VII context are the rights to oppose, to charge, and to participate in the resolution of discrimination-based disputes. Their unfettered exercise is guaranteed by section 704(a). If discriminatory treatment were the sole probative means of establishing the "discrimination" element of section 704(a) actions, opposing employees would be faced with an untenable burden of proof in cases such as *Barela* in which the chilling effect of employer actions was combined with arguably permissible grounds for such action. The enforcement potential of the Act would suffer a corresponding diminution. Under these circumstances the extension of the "chilling effect" doctrine of section 704(a) actions seems singularly appropriate. Thus, the EEOC and the courts should hold that section 704(a) "discrimination" is established whenever employer or union conduct has the foreseeable effect of chilling the exercise of "opposition."[111] It should be noted that "infringement" or "chilling effect," so framed, does not dispense with the requirement that the "discrimination" took place "because of" the charging party's opposition. In other words, the requirement of intent in section 704(a) violations remains intact. "Chilling effect" merely facilitates proof of "discrimination" by broadening its definition to include the consequence as well as the disparateness of employer actions. *Barela* and *Plumbers Local 189* support this rationale. Future decisions, however, should clearly articulate the bases for concluding that "discrimination" has in fact taken place. If employers are to be judged according to the discriminatory consequences of ordinarily innocuous actions, they should know the judgmental standards.

b. Manufactured Reasons for Discipline

A different problem is posed when an employer succeeds in manufacturing a case for discharging or for otherwise disciplining an opposing employee. In this instance, unlike that in *Barela* in which the applicant was admittedly qualified for the position sought, it is either an employee's qualifications or job performance which is in question. The employer in this instance is usually able to demonstrate a consistent pattern of discipline for employees who engage in the prohibited behavior. Furthermore, the prohibited employee behavior, arguably, will be inimical to the

[110] *Id.* at 275.

[111] See text accompanying notes 88-90 *supra*.

continued successful operation of the employer's business. But the gist of the discrimination is in the "manufacturing" and not in the presence or absence of conduct justifying some discipline under normal circumstances. In the discovery of disparate treatment in this setting, the employer's entire course of conduct in assessing an opposer's fitness should be open to question, including the employer's comparable assessments of previous violators' fitness.

In *Francis v. American Telephone & Telegraph Co.*,[112] the plaintiff, after filing charges of racial discrimination against AT&T, was placed under constant and oppressive supervisory surveillance and was subjected to strict scrutiny in matters of personal deportment. The plaintiff incurred several disciplinary suspensions and was eventually dismissed for failing to comply with "the rules and guidelines that were set forth for all employees."[113] It was true, as AT&T alleged, that the plaintiff frequently violated the rules of her employment. In the words of the court, however, it was also clear that:

> [O]ther employees both white and Negro were equally guilty of similar violations and derelictions of duty and that, prior to the time plaintiff complained to EEOC, there was no substantial difference in the manner the defendant treated those who were guilty of such violations and derelictions of duty.
>
> After plaintiff complained to EEOC, however, the manner in which plaintiff was treated was changed and a procedure applicable only to her and directed solely to her EEOC complaint was inaugurated.[114]

The court held that AT&T's "course of conduct" discriminated against the plaintiff within the meaning of section 704(a).[115]

Francis is an easy case of its genre. The disparate treatment was obvious. When the fact of opposition is abstruse or evidence of disparate employer conduct is scarce, however, the problems of proof are obviously more difficult. Protection of opposing parties in such circumstances may well require courts to infer the existence of a discriminatory course of conduct from the fact that a violation of company rules is found. The rationales for such an inference are twofold: First, only through unusually close surveillance would the violation be discovered,[116] and secondly, equally

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[112]55 F.R.D. 202 (D.D.C. 1972).

[113]*Id.* at 207.

[114]*Id.*

[115]*Id.*

[116]*See* EEOC Decision No. 71-382, Oct. 30, 1970, in CCH EEOC Decisions ¶ 6202 (1973) (After employee filed charges with EEOC, notes were kept documenting any of his absences which fell on Monday or Friday, and no such records were maintained for any other employee).

diligent monitoring would reveal similar violations by nonopposers.[117] Such an inference merely shifts the burden of proof to the employer to specify the methods used to discover the violations in this type of case—especially when the violations are unusual or occasion abnormally harsh discipline.[118] It is proper that the burden of proof reside with the employer since he has established and commands the means of discovering employee violations. Furthermore, the relatively close proximity of any disciplinary actions taken against an "opposing" employee will raise the spectre of retaliation and will have a "chilling effect" upon future opposition. Thus, when the employer's course of conduct is at issue, it is not unreasonable to compel him to identify and describe that course of conduct.

2. The "Because of" Requirement

Section 704(a) prohibits discrimination occasioned "because of" opposition. Direct proof of employer motive or intent is difficult, and courts and the EEOC have not required such proof as a condition for satisfying the "because of" requirement. Proof that the employer has received notice of opposition, however, is essential.[119] The required nexus between opposition and discrimination cannot be established without it.

The best evidence of a nexus between opposition and discrimination is the employer's own words. Employers or supervisory employees, however, are seldom so careless as to presage their discrimination with assertions of hostile motive or intent. Thus, the inference of employer discriminatory intent to stifle

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[117] *See* EEOC Decision No. 71-1115, Jan. 11, 1971, in CCH EEOC Decisions ¶ 6201 (1973) (corrective notices placed only in charging party's personnel folder despite the fact that department supervision was lax and numerous similar unrecorded rule violations were committed by other employees).

[118] *See* EEOC Decision No. 71-1885, Apr. 22, 1971, in CCH EEOC Decisions ¶ 6237 (1973) (In a four year period, charging party's foreman had issued only eleven safety violation reprimands of which only two, those issued to charging party, resulted in suspensions); EEOC Decison No. 71-288, Sept. 17, 1970, in 2 CCH EMPL. PRAC. GUIDE ¶ 6413 (1974) (charging party placed under surveillance and discharged without customary warning notices).

[119] *See* EEOC Decision No. 71-1000, Dec. 29, 1970, in CCH EEOC Decisions ¶ 6194, at 4,330 (1973), in which it was held that:

> In order to find a violation of Section 704(a) the Commission must first find that Respondent's supervisory personnel who participated in the complained-of act have either actual or imputed knowledge of Charging Party's opposition to an allegedly unlawful employment practice or of Charging Party's having previously filed a charge with the Commission or participated in a Commission investigation.

opposition is the primary means of satisfying the "because of" requirement. This inference is drawn from the fact that the respondent has engaged in disparate treatment against an applicant or employee following his registry and the employer's receiving notice of "opposition." The proximity of the discrimination to the notice of opposition is the crucial factor. In some circumstances the inference may be so compelling as to submerge the importance of normally satisfactory explanations for employee discipline.[120] In *Edward G. Budd Manufacturing Co. v. NLRB*,[121] the Third Circuit Court of Appeals upheld an NLRB finding that the discharge of an admittedly recalcitrant and unproductive employee of long tenure was unlawfully motivated by his participation in union organizing activities. In the words of the court:

> [A]n employer may discharge an employee for a good reason, a poor reason or no reason at all so long as the provisions of the National Labor Relations Act are not violated. It is, of course, a violation to discharge an employee because he has engaged in activities on behalf of a union. Conversely an employer may retain an employee for a good reason, a bad reason or no reason at all and the reason is not a concern of the Board. But it is certainly too great a strain on our credulity to assert, as does the petitioner, that Weigand was discharged for an accumulation of offenses. We think that he was discharged because his work on behalf of the CIO had become known to the plant manager. That ended his sinecure at the Budd plant.[122]

Commission decisions have generally followed this proscription in the section 704(a) context[123] and have recognized an infinite variety of ways in which an employer may justify disciplinary actions.[124]

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[120]*See* Francis v. American Tel. & Tel. Co., 55 F.R.D. 202 (D.D.C. 1972); EEOC Decision No. 71-1885, Apr. 22, 1971, in CCH EEOC Decisions ¶ 6237 (1973) (Within one year after the employee was promoted, as a result of his filing charges with EEOC, he was given three disciplinary notices and two suspensions for safety violations, even though he had received only two disciplinary notices in the previous twenty-six year period he had worked for the respondent).

[121]138 F.2d 86 (3d Cir. 1943).

[122]*Id.* at 90-91.

[123]*See, e.g.*, Francis v. American Tel. & Tel. Co., 55 F.R.D. 202 (D.D.C. 1972); EEOC Decision No. 71-1885, Apr. 22, 1971, in CCH EEOC Decisions ¶ 6237 (1973); EEOC Decision No. 71-1626, Apr. 18, 1971, in CCH EEOC Decisions ¶ 6230 (1973); EEOC Decision No. 71-1115, Jan. 11, 1971, in CCH EEOC Decisions ¶ 6201 (1973).

[124]The proximity factor is also responsible for the view of the courts and the Commission that mixed motives, one permissible and the other

The viability of the inference of respondent's intent may be determined in part by the form of opposition. Some informal forms of opposition, such as threatening or complaining, may not adequately communicate the Title VII basis of the opposition. Suppose, hypothetically, that an employer threatened by informal opposition ran a discrimination free shop and had no inkling that a threatening employee was opposing practices thought to be discriminatory. It would hardly seem just to hold that the employer's reasonable reprimand of the employee constituted discrimination "because of" employee opposition. Certainly no hostile intent could be imputed to an employer who lacked notice of opposition.[125] But an employer who pinions his defense in such situations upon lack of notice should beware. His claim is predicated upon the most tenuous of circumstances. He must be able to demonstrate that it was *reasonable* for him to lack notice of his employee's opposition despite the fact that some complaining, threatening, or rights-seeking had taken place. In the face of an averment that an employer lacked notice, an employee should be permitted to introduce evidence of any section 703 discrimination practiced in the employer's establishment, along with any previous complaint of such discrimination. Proof of present discrimination or prior complaints is probative not only of the "reasonableness" of the plea that no notice was given, but also of the motivation for retaliation generally.

Significant support for the use of section 703 discrimination evidence in this situation and in any circumstance in which the employer offers an alternative ground for the disciplinary action can be found in the Supreme Court's treatment of *McDonnell Douglas Corp. v. Green.*[126] As noted, the Eighth Circuit dismissed Green's section 704(a) claim,[127] on the basis that the section did not protect "activities which run afoul of the law." However, the claim was remanded on the ground that Green was not given an opportunity to present evidence of the alleged section 703 racial discrimination in McDonnell's refusal to rehire him. Since Green chose not to appeal the section 704(a) dismissal, the only questions before the Supreme Court related to section 703.

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proscribed by section 704(a), established the "because of" element. *See, e.g.*, United States v. Hayes Int'l Corp., 7 CCH Empl. Prac. Dec. ¶ 9164, at 6874 (N.D. Ala. 1973) ("If any element of racial discrimination or retaliation or reprisal played any part in a challenged action, no matter how remote or slight or tangential . . ." a violation of section 704(a) would be established).

[125]*See* EEOC Decision No. 71-1000, Dec. 29, 1970, in CCH EEOC Decisions ¶ 6194 (1973).

[126]411 U.S. 792 (1973).

[127]See text accompanying notes 67-68 *supra.*

In upholding the Eighth Circuit's remand order, the Supreme Court held that Green "must . . . be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext."[128] The Court reasoned that the stated basis for the refusal to rehire must be applied uniformly to avoid racially discriminatory treatment. The Court then elaborated upon the kind of evidence which would be probative of such discriminatory treatment—more particularly discriminatory motive—as follows:

> Other evidence that may be relevant to any showing of pretext includes facts as to the petitioner's treatment of respondent during his prior term of employment; petitioner's reaction, if any, to respondent's legitimate civil rights activities; and petitioner's general policy and practice with respect to minority employment. On the latter point, statistics as to petitioner's employment policy and practice may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks. In short, on the retrial respondent must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a cover-up for a racially discriminatory decision.[129]

Receipt of such evidence in the section 704(a) context is equally relevant.[130] An employer cannot fairly complain that he lacks notice of the race or sex basis of an employee's complaints or threats when the working environment is rife with unlawful discrimination for which the employer bears responsibility.

While evidence of section 703 discrimination should be probative of the employer's motivation to discriminate and his notice of opposition, it has little relevance in discovering the fact of opposi-

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[128] 411 U.S. at 804.

[129] *Id.* at 804-05 (citations omitted).

[130] *See* Tidwell v. American Oil Co., 332 F. Supp. 424 (C.D. Utah 1971). *Contra,* Terrell v. Feldstein Co., 468 F.2d 910 (5th Cir. 1972). Terrell complained that he was denied benefits and discharged because he filed charges with the EEOC. The Fifth Circuit Court of Appeals affirmed the district court's finding that Terrell was not an object of section 704(a) discrimination. On the issue of whether the district court should have considered statistical evidence of section 703 class discrimination, the court held:

> Although statistical evidence of a pattern or practice of discrimination is of probative value in an individual discrimination case for the purpose of showing motive, intent, or purpose . . . it is not determinative of an employer's reason for action taken against an individual grievant.

Id. at 911.

tion and the fact of section 704(a) discriminatory treatment. Some EEOC decisions have apparently concluded that the existence of section 703 discrimination presumptively establishes those two elements of a section 704(a) claim for relief.[131] Such reliance upon section 703 evidence is misplaced. Certainly, as illustrated in *Green,* a single employer action may yield simultaneous violations of section 703 and section 704(a), but the violations are distinct. In merging the violations, the Commission only obliterates their distinctions, particularly those characteristic of section 704(a). While this practice may not prove troublesome in the EEOC's conciliation attempts, it will likely inhibit the Commission's ability to isolate significant section 704(a) violations and to act expeditiously in seeking and securing preliminary relief under section 706(f)(2).

This theory of the section 704(a) prima facie case of retaliation is broad. It permits little or no analysis of the propriety of the form of opposition. Thus, the determination of "what constitutes *protected* opposition" is viewed as a premature inquiry at this stage. Likewise, the balancing of legitimate employer interests again the "chilling effect" of his actions has no place in the determination of the prima facie case. If such a reading of section 704(a) seems unduly harsh, it should be remembered that the enforcement scheme of Title VII invites and requires the affirmative participation of parties who would be defenseless without the protections afforded by the section. If section 704(a) is to serve as a deterrent to ill-conceived retaliation, it must effectively notify employers and unions that they will be faced with the burden of affirmatively justifying actions taken against an opposing party. Employers and unions must know that normally permissible acts may be unlawful when preceded by opposition to discriminatory employment practices. Finally, the supposed breadth of section 704(a) protection can be realized only if Commission and court decisions elucidate a comprehensive and consistent format for the determination of the difficult issues. In section 704(a) cases no amount of ultimately correct conclusions

[131] *See, e.g.,* EEOC Decision No. 71-357, Oct. 22, 1970, in CCH EEOC Decisions ¶ 6168 (1973). In that case, the respondent employer knowingly retained foremen who were racially prejudiced. On the basis of one such foreman's statement that the charging party was a racial agitator and took personal affront to every conversation in which race was a factor, the Commission concluded that section 704(a) discrimination was established by charging party's discharge. *See also* EEOC Decision No. 72-1380, Mar. 17, 1972, in CCH EEOC Decisions ¶ 6364 (1973) (section 704(a) violation found when male charging parties were discharged and disciplined for failure to conform to company's sex discriminatory "long hair" and "facial hair" policies).

can compensate for erroneous supportive rationale. The history of *Green* proves this much.

IV. Defenses

Employers have traditionally offered one all-encompassing justification for adverse actions against opposing parties: namely, the existence of "independent grounds" for the action. While permissible independent grounds for adverse action may exist in a given situation, the traditional use of the phrase has camouflaged the significant differences which exist among "independent grounds."

A. Independent Grounds—Employee Misconduct and Lack of Qualifications

An employee's lack of qualifications or his violation of company rules are standard justifications for adverse actions by his employer. It is axiomatic that employers need hire and promote only those who are qualified.[132] No difference exists between section 703 and section 704(a) actions in this respect. Thus, demonstrated inability to perform should rebut the presumption that an opposing party was the object of retaliatory employer action because of his failure to win a job or promotion.[133]

An employee who opposes and, in addition, engages in misconduct presents a different problem. Proof of misconduct alone should not rebut the presumption of retaliation established by the employee. An employer should be required to demonstrate that similar misconduct of other employees consistently resulted in the kind of adverse actions suffered by the opposing party,[134] and that the discovery of misconduct was not the result of abnormal surveillance occasioned by an employee's opposition. The close proximity of opposition and the assigned reason for adverse action dictate such a burden. Furthermore, an employer alleging that independent reasons justify adverse action disavows the sometimes reasonable inference that unlawful mixed motives occasioned his action. Only by revealing his course of conduct with

[132] *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[133] *See* Bradington v. International Bus. Mach. Corp., 360 F. Supp. 845 (D. Md. 1973).

[134] In some situations the exaction of the adverse action may have been accelerated by the employee's opposition. *See* EEOC Decision No. 71-2330, June 2, 1972, in CCH EEOC Decisions ¶ 6247 (1973) (employee was not given the normal two weeks of employment following written notice of intent to resign after she informed her supervisor informally that she was going to file charges and seek employment elsewhere following her denial of promotion).

respect to adverse action—and similar actions—can an employer reveal facts peculiarly within his control capable of rebutting that inference.

B. Business Justifications

Employers occasionally defend section 704(a) actions by asserting that the form of an employee's opposition permitted the adverse action taken against him. Business justification rather than independent grounds is the crux of this defense. Neither the courts nor the EEOC have articulated the rationale for this defense upon such grounds—perhaps because the obvious policy considerations at the heart of this defense are so easily confused with the broad definitions of "opposition" and "discrimination." For example, courts and the Commission have insisted upon determining initially whether employee actions constitute "protected opposition" rather than opposition vel non.[135] Courts and the Commission are concerned with the fact that the form of an employee's opposition may itself, arguably, justify adverse action taken against him by his employer. Thus, while examining an employee's conduct to discover the existence of "opposition," courts go further and reach a judgment regarding the propriety of the form of opposition. As in *Green,* employee action is sometimes found to constitute "unprotected opposition." When this occurs courts are inevitably left with little justification for their conclusion beyond platitudinous rhetoric which defines for all future cases the supposed limits of "protected opposition."[136]

Actually, the limits of "opposition" can correctly be defined only according to the circumstances in which "opposition" arises. What may be permissible opposition for a female bookbinder in Chicago may not be permissible for a Cuban-American salesman in Miami. What appears to be ill considered opposition may prove when judged in context to be restrained and proper. Distinctions of this kind find validity in the balancing of employer interests against the interests embodied in the Act—those of employees and of society in preserving the right to oppose. This balancing has no place in the establishment of an employee's case. In fact, the strength of that case is one of the factors on the employee-society side of the equation. Examination of two possible bases for employer business justifications should reveal this point.

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[135]*See* Green v. McDonnell-Douglas Corp., 463 F.2d 337 (8th Cir. 1972), *vacated and remanded,* 411 U.S. 792 (1973); Pettway v. American Cast Iron Pipe Co., 411 F.2d 998 (5th Cir. 1969); EEOC v. Plumbers Local 189, 311 F. Supp. 464 (S.D. Ohio 1970).

[136]See text accompanying notes 67 & 68 *supra.*

1. "Disqualification"

In every employment situation there are limits to opposition. Opposing employees, however meritorious their grievances and however frustrated their attempts at redress may be, must act in a reasonable manner if they seek the protection of section 704(a). When opposition exceeds reasonable limits, the opposing employee can accurately be said to have disqualified himself from that protection.[137] The limits in question should not be defined by employer rules of conduct,[138] and the limits should not be so confining as to stifle legitimate opposition. Rather, the limits in each situation should be discoverable only by a court's assessment of the opposing party's good faith in seeking redress of discrimination within the employment relation. Stated positively, an employer disposed to punish opposition on the ground of "disqualification" must be able to demonstrate that his employee's opposition was deliberately destructive of the employment relationship and significantly compromised the rights of others.

The filing of administrative and judicial actions secures the absolute protection of section 704(a).[139] No matter how harassing and lacking in substance are such charges, an employer is

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[137]"Disqualification" is a novel concept only in its application in defense of a prima facie case of section 704(a) discrimination. It has its antecedents in the concept of protected concerted activities under section 7, 29 U.S.C. § 157 (1970), and section 8(a)(3), *id.* § 158(a)(3), of the National Labor Relations Act. Section 7 provides that "[e]mployees shall have the right . . . to engage in . . . concerted activities for the purpose of collective bargaining or mutual aid or protection . . . ." Section 8(a)(3) declares that "[i]t shall be an unfair labor practice for an employer . . . by discrimination . . . to encourage or discourage membership in any labor organization." Employer discrimination against an employee for engaging in concerted activities violates section 8(a)(3), NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963), but certain kinds of concerted activities demonstrate such utter disregard of the employment relationship and the welfare of nonparticipating employees that they are deemed unprotected by the Labor Board and the courts. Various forms of concerted activities have been found to be unprotected in some circumstances. NLRB v. Electrical Workers Local 1229, 346 U.S. 464 (1953) (public disparaging of employer's product); NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939) (seizure of employer's plant and engaging in a sit-down strike); Firestone Tire & Rubber Co., 449 F.2d 511 (5th Cir. 1971) (use of physical force and violence); NLRB v. Clearfield Cheese Co., 231 F.2d 70 (3d Cir. 1954) (threat of bodily harm to nonparticipating employees); Hoover Co. v. NLRB, 191 F.2d 380 (6th Cir. 1951) (striking to force employer to commit an unfair labor practice).

[138]*See* NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962) (despite rule against leaving the work station without consent, actions of employees who walked off job complaining that work place was too cold protected under section 8(a)(3)).

[139]*See* Pettway v. American Cast Iron Pipe Co., 411 F.2d 998 (5th Cir. 1969); EEOC v. Plumbers Local 189, 311 F. Supp. 464 (S.D. Ohio 1970).

estopped from engaging in self-help to punish an employee who continuously files charges. The position of some opposing employees, such as those who repetitively threaten their foremen with future charges, is more tenuous. Employees as well as employers can harass, and a point will be reached at which a threatening or complaining employee might logically be expected either to file his charge or to keep his mouth shut. Employers who present evidence of constant employee complaints of discrimination, of attempts to address those complaints or point out the presence of institutional remedies, and of the disruptive nature of the continual complaining might justify their punishment of employee complaints or threats on the basis of a theory of disqualification.[140] It is important to note that it is the *pointless, disruptive constancy* of an employee's complaints in the face of an available remedy—Title VII—which calls his good faith into question. It is qualities such as these which distinguish "disqualification" from an employer's argument that good faith requires a disgruntled employee to always choose the least disruptive—and perhaps the least effective—manner of registering his opposition. Clearly, "disqualification" cannot be interpreted as requiring employees to choose at their peril among various permissible opposition options. If so, the defense would obliterate the reason for the protection conferred by Title VII.

Disqualification is also an alternative to the unwarranted designation of certain kinds of opposition as "unprotected." In *Green,* the "stall-in" used to protest McDonnell's alleged discriminatory practices blocked traffic during a shift change. Green was found guilty of a minor traffic offense as a by-product of his opposition. In predicating their section 704(a) decisions upon the lawfulness of Green's actions, the district court and the court of appeals clearly missed the point. Neither unlawfulness per se nor unlawful conduct directed at McDonnell justified its refusal to rehire. Rather, the adverse action was justified by Green's blatant disregard of his potential employment relationship and of the rights of his fellow employees and employer. The Supreme Court, in its treatment of the race-based charge in *Green,*[141] intimated

[140] *See* Ammons v. Zia Corp., 448 F.2d 117 (10th Cir. 1971) (no violation of section 704(a) shown in employer's discharge of employee on the basis of numerous and repeated complaints regarding her alleged artificially depressed wage rate).

[141] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 803 nn.16-17 (1973), in which the Court reasoned that:

> Respondent admittedly had taken part in a carefully planned "stall-in," designed to tie up access to and egress from petitioners plant at a peak traffic hour. Nothing in Title VII compels an employer to

the propriety of such factors. This recognition of employee responsibility is even more important in the section 704(a) context when the employee seeks protection from discrimination not because of his status but because of his actions. "Disqualification" establishes those responsibilities without destroying the flexibility of employee action or yielding clichéd definitions of "protected opposition."

2. *Overriding Business Interests*

A prima facie case of section 704(a) retaliation may be established in part through the application of the "chilling effect" doctrine in those instances in which an employer's adverse action has first, a neutral basis and no apparent retaliatory motive, and secondly, a foreseeable effect of stifling opposition. When an opposing party's case is established through such means, an employer must be given the opportunity to demonstrate that "overriding business interests" justify his actions notwithstanding a possible "chilling effect."

Unlike the "business necessity" defense applicable to section 703 actions,[142] the "overriding business interests" defense is applicable only to the particular adverse action complained of and does not question the continued validity of the neutral policy as a tool for employer decision-making. These differences are dictated in large measure by the absence of class considerations in section

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absolve and rehire one who has engaged in such deliberate, unlawful activity against it.

After observing that the absence of personal injury or property damage was fortuitous, the Court noted that Green's unlawful activity was "directed specifically against" the company. The Court pointedly reserved the question of whether unlawful activity not directed against a particular employer might justify a refusal to hire.

[142] *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). In discussing the application of the company's pre-employment tests and high school diploma requirement, each of which disqualified a disproportionately high percentage of Blacks, the Court stated:

> The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operated to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

"Business purpose" alone cannot justify discriminatory policies. United States v. N.L. Indus., 479 F.2d 354 (8th Cir. 1973). Rather, the establishment of business necessity now seems to require a finding that the discriminatory practice is necessary to the safe and efficient operation of the business and that there are no less discriminatory alternatives to the employer's practices. *See* Moody v. Albermarle Paper Co., 474 F.2d 134 (3rd Cir. 1973); Equal Employment Opportunity Comm'n, Guidelines on Employee Selection Procedures, 37 C.F.R. § 1607.3 (1973).

704(a) discrimination. Thus, "overriding business interests" are only those which are concretely operative in the particular situation in which opposition occurs. In *Barela,* for example, the employer's decision not to hire a qualified applicant was allegedly based upon its policy of only hiring permanent employees. Since Barela had a section 703 charge pending against a previous employer which might have entitled him to reassume his former job, United Nuclear reasoned that Barela was not seeking permanent employment and, therefore, refused to process his application. Assuming for purposes of discussion that there was no discriminatory application of the employer's permanent employee rule, Barela should nevertheless have been able to establish his prima facie case through application of the "chilling effect" doctrine.[143] The employer then would have been obligated to assume the burden of justifying its application of the permanent employee role to Barela, a Title VII claimant. On the basis of the "overriding business interests" defense this burden should have required the employer to prove that its waiver of the rule for Barela would so severely impede its business interests as to override the purpose of section 704(a).[144] While the scope of this inquiry is necessarily broad, the burden is not an impossible one, even in the face of opposition which is obviously deserving of protection, such as the filing of a charge. It should include an examination of the necessity for permanency and other job requirements, their susceptibility to accommodating modification, the depth of the "chilling effect," an employee's opportunity for other comparable employment, the reasonableness of the form of opposition, and the state's interest in protecting it.

Unlike the courts' approach in *Barela,* the last two considerations could be weighted heavily against an opposing employee if his opposition itself violated company rules or became harassing. The disciplining of a rule-breaking employee because of his actions may well enable him to establish a prima facie case under the "chilling effect" doctrine. While his actions may not be so patently offensive as to justify "disqualification," the form of his actions, especially in view of alternative means of opposition and their known or predicted effect upon the maintenance of an employer's business, might enable an employer to justify disci-

[143]See notes 101-11 *supra* & accompanying text.

[144]An analogy to section 8(a)(3) protected concerted activities is again appropriate. See note 137 *supra.* The concerted activities of employees may not be so offensive as to constitute breaches of the peace or physical violence, yet may be so injurious to the employer's right to manage and operate his establishment that the action will not secure the protection of section 8(a)(3). *See* NLRB v. Rockway News Supply Co., 345 U.S. 71 (1953); NLRB v. Jamestown Veneer & Plywood Corp., 194 F.2d 192 (2d Cir. 1952).

pline according to "overriding business interests."[145] Quite correctly, opposition has not been construed to guarantee an employee immunity from employer discipline.[146] Proper discipline of employees is a matter of management discretion, and section 704(a) does not alter this facet of employee-management relations. The interests of the government and of employees in protecting the right to oppose practices thought to be violative of Title VII, however, are equally important. The accommodation of these competing interests in the context of violations of reasonable, uniformly applied employer rules will remain difficult. The proper use of the "overriding business interests" concept may ease the burden on the EEOC and the courts in reaching satisfactory accommodations.

"Disqualification" and "overriding business interests" are defenses which qualify opposition. In their broadest sense they provide formulae for measuring the reasonableness of employee opposition and employer response. That measurement must take cognizance of the environment and conditions which spawned the opposition as well as the interests which section 704(a) seeks to protect. Though the responsibility for reasonable action belongs to the opposing party, the burden of establishing "disqualification" and "overriding business interests" should reside with the employer. The extent of the burden and its proper discharge can only be determined after the opposing party has established his prima facie case.

V. Conclusion

Persons who oppose employment discrimination are catalysts for social change. They are at once the rallying point for depressed classes of minorities and women and are a logical target for institutional reprisal. These factors, combined with a cumbersome and thus far inefficient enforcement system, make expeditious and careful judicial scrutiny of reprisal claims essential.

Indeed, the protection of those opposing employment discrimination can, at times, take on an importance far beyond the substantive grievances for which they seek redress. Unremedied retaliation stifles not only opposing parties but also all those grievants who fear similar reprisals. *Pettway* and various court and

[145]Some forms of opposition may have a direct and immediate adverse effect upon the employee's ability to achieve satisfactory results in his assigned tasks. *See* EEOC Decision No. 71-1850, Apr. 21, 1971, in CCH EEOC Decisions ¶ 6245 (1973) (union's discharge of a White organizer who demonstrated against other union's alleged racial bias, thereby decreasing opportunities for union solidarity, violated 704(a)).

[146]*See* United States v. Hayes Int'l Corp., 7 CCH Empl. Prac. Cases ¶ 9164 (N.D. Ala. 1973).

EEOC decisions lend credence to this view and establish the substantive basis for effective enforcement of section 704(a). The emerging problem for the courts resides in the further amplification of the scope of protected activity and, more importantly, in the delineation of the proper order of proof in section 704(a) actions. This problem is compounded by the inevitable tension which exists between an employer's right to discipline and an employee's right to oppose. The balancing of these competing interests within the framework of section 704(a) can best be accomplished by their functional separation. Employees must be given an opportunity consistent with the broad protective character of section 704(a) to establish the existence of a violation. Employers must then be given an opportunity to rebut a prima facie violation established by the employee or to justify its actions according to concepts such as "disqualification" or "overriding business interests."

Employers are now becoming aware of the liabilities of discriminatory employment practices. While this new awareness may not herald an age of enlightenment in equal opportunity, it does set the stage for the development of employer policies which will stimulate self-examination rather than retaliation in the face of employee opposition. Courts will play a positive role in this transformation only if they clearly articulate the scope of the section 704(a) protection.

Comment

Reversals for Insufficient Evidence: The Emerging Doctrine of Appellate Acquittal

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I. INTRODUCTION

The traditional relief demanded and received upon appellate court reversal of a criminal conviction has been remand for a new trial. Although it is generally considered to be within an appellate court's power to order an appellant discharged by entering a judgment of acquittal, this power is exercised sparingly and only in cases in which remand for a new trial is barred by some constitutional or statutory rule of law.[1] In recent years

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[1]Among others, retrial could be barred by reason of a statute of limitations or because of a denial of the accused's right to a speedy trial or the privilege against double jeopardy. Once there has been an adjudication that prosecution of the crime is barred by the statute of limitations, principles of res judicata preclude a second litigation of the issue. United States v. Oppenheimer, 242 U.S. 85 (1916). Similarly, dismissal for denial of the right to speedy trial is a bar to further prosecution. *See* State v. Taylor, 235 Ind. 632, 137 N.E.2d 537 (1956); State v. Soucie, 234 Ind. 98, 123 N.E.2d 888 (1955). But when there is a pretrial dismissal of the prosecution before jeopardy has attached, the State may take a direct appeal from the ruling and, if successful, the defendant is subject to retrial. It is only when the dismissal stands on appeal that res judicata precludes a second prosecution. Accordingly, IND. CODE § 35-1-47-4 (IND. ANN. STAT. § 9-2307, Burns 1956) provides:

> An appeal taken by the state shall in no case stay, or affect the operation of the judgment in favor of the defendant until the judgment is reversed: Provided, That if an appeal be taken by the state from an order or judgment by which the defendant is discharged prior to trial, the said order or judgment shall not be or constitute a bar to further prosecution of the defendant, if said order or judgment is reversed, and the trial court shall order a warrant to issue for his re-arrest, returnable forthwith.

It is quite a different matter, however, if the dismissal order is entered after jeopardy has attached, *i.e.*, after the jury is sworn or, in the case of a trial to the court, after the first witness is sworn. *See, e.g.*, Kelley v. State, 295

courts have begun to address the queston of whether appellate acquittal is appropriate when the evidence adduced against the defendant at trial is found to be insufficient to sustain a criminal conviction. On the theory that such a defendant was entitled to an acquittal in the trial court and, therefore, should be granted an acquittal at the appellate level, the appellate courts of a few states now order defendants discharged without remanding the cases for retrial. Furthermore, the appellate acquittal has the same effect as an acquittal in the trial court: retrial is barred by reason of the constitutional prohibition against double jeopardy. The precise issue addressed in this Comment is whether Indiana should join the growing number of states which have adopted the emerging doctrine of appellate acquittal.

Whether a finding of insufficient evidence on appeal constitutes a double jeopardy bar to retrial for the same offense has not been decided by the Indiana courts. That the issue has not been fully considered may, in part, be the result of the reluctance of appellate courts to review the fact-finding process which occurred at the trial. It is a basic principle of Indiana appellate procedure that a reviewing court will not reconsider issues of fact decided against the defendant at trial. The presumptions are in favor of the decision of the lower court; if there is any evidence in the trial court record to support the verdict and judgment, the conviction will be sustained regardless of the weight and credibility of the evidence. It is the function of the trier of fact to evaluate the demeanor and credibility of witnesses and ultimately determine the truth, a task for which appellate courts are particularly unsuited. Accordingly, it is the established rule in Indiana that the reviewing court will consider only the evidence most favorable to the State in determining the sufficiency of the

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N.E.2d 372 (Ind. Ct. App. 1973); Crim v. State, 294 N.E.2d 822 (Ind. Ct. App. 1973); Armentrout v. State, 214 Ind. 273, 15 N.E.2d 363 (1938); Joy v. State, 14 Ind. 139 (1860); Weinzorpflin v. State, 7 Blackf. 186 (Ind. 1844). *See also* United States v. Jorn, 400 U.S. 470 (1971). After jeopardy has attached, the judgment may constitute an acquittal, in which case the State may not appeal for the purpose of gaining a new trial. *See, e.g.*, State v. Newkirk, 80 Ind. 131 (1881); State v. Davis, 4 Blackf. 345 (Ind. 1837). *See also* United States v. Sisson, 399 U.S. 267 (1970) (government may not appeal from so-called order in arrest of judgment which in reality is a judgment of acquittal). Even when an appeal is authorized as a reserved question under IND. CODE § 35-1-43-2 (IND. ANN. STAT. § 9-2102, Burns, 1956), a judgment on appeal in favor of the State does not act to reverse the judgment of acquittal below and the defendant may not be tried a second time. *See, e.g.*, State v. Patsel, 240 Ind. 240, 163 N.E.2d 602 (1960); State v. Torphy, 217 Ind. 383, 28 N.E.2d 70 (1940); State v. Kubiak, 210 Ind. 479, 4 N.E.2d 193 (1936); State v. McCaffrey, 181 Ind. 200, 103 N.E. 801 (1914).

proof to support a judgment of conviction.[2] Thus, while a trial court, upon a request for a new trial, may sit as the "thirteenth juror" and weigh the evidence, courts of appellate jurisdiction regularly refuse frequently tendered invitations to do so.[3]

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[2]*See, e.g.*, Richardson v. State, 247 Ind. 610, 220 N.E.2d 345 (1966); Bush v. State, 246 Ind. 574, 207 N.E.2d 625 (1965); Schweigel v. State, 245 Ind. 6, 195 N.E.2d 848 (1964); Blood v. State, 214 Ind. 578, 16 N.E.2d 874 (1938).

It should be noted that the standard of review in Indiana is less favorable to the accused than it is in many other jurisdictions. For example, in Florida the courts on appeal will reverse judgments of conviction even if the evidence is legally sufficient but is so weak that retrial should be granted in the interest of justice. The rule frequently is invoked in cases of convictions for sex offenses when the State's evidence consists chiefly of the testimony of the prosecuting witness. *See* Sosa v. Maxwell, 234 So. 2d 690 (Fla. Ct. App. 1970); Smith v. State, 239 So. 2d 284 (Fla. Ct. App. 1970). In Indiana, however, the courts will reverse only when the evidence is insufficient as a matter of law, in which case reversal is required as a matter of due process of law. See note 5 *infra*. Except when otherwise indicated, the term "insufficient evidence" is used in this Comment in the latter sense, *i.e.*, that the evidence is insufficient as a matter of law to sustain the conviction.

Whether the Indiana standard of review does in fact meet the requirements of due process is a different question, since there are two basic due process issues which are not necessarily coextensive in scope. The standard does meet the requirements to the extent that convictions are reversed when there is no evidence on a material element of the offense charged. See notes 5 & 6 *infra*. It may be the case, however, that even when there is some evidence on all material elements, the evidence may be so weak that, as a matter of law, it cannot be said that guilt was established by proof beyond a reasonable doubt, a second requirement of due process of law. See note 4 *infra*. Although the concept of proof beyond a reasonable doubt traditionally has played a minor role in the evaluation of evidence at the appellate level, it is now an element of due process and should not be excluded from appellate consideration. Moreover, the concept that appellate courts are unsuited for evaluation of demeanor and credibility, because their review is limited to a cold paper record, may no longer be valid, at least in those trial courts where the proceedings are recorded by videotape process. In light of these considerations, as well as others, the Indiana courts may be compelled to modify the present restrictive standard of appellate review of the evidence.

[3]It may be noted that the trial court has greater power than the court of appeals. Trial Rule 59(A)(4) of the Indiana Rules of Trial Procedure specifies as a ground for relief in the motion to correct errors that the verdict or decision is "contrary to the evidence." Trial Rule 59(E)(7) provides that, in reviewing the evidence, the court shall grant a new trial if the decision is found to be against the weight of the evidence. In civil cases the rule has been construed to afford the trial court broad powers to sit as the "thirteenth juror." Davis v. Lee, 292 N.E.2d 263 (Ind. Ct. App. 1973). Trial Rule 59 is incorporated into criminal practice by Rule 16 of the Indiana Rules of Criminal Procedure. Although the double jeopardy provisions clearly would prohibit a new trial for the State following a verdict of acquittal by the jury, the trial court may weigh the evidence and award the defendant such relief.

Notwithstanding this restrictive standard of review, appellate courts do reverse judgments of conviction because of the insufficiency of the evidence. It is only when the evidence at trial is conflicting that the findings of fact are not reviewable on appeal, for it is only in this context that the reviewing court is asked to "weigh" the evidence. It is quite a different matter when there has been a total failure of proof as to one or more of the essential elements of the crime charged. Here the reviewing court is not asked to weigh the evidence but to decide a question of law, for, as a matter of law, the State must present some evidence on each and every material element of the crime charged. In the absence of such evidence the State could not have proved the accused guilty beyond a reasonable doubt, and different considerations come into play.[4] Whether the evidence is sufficient with respect to each of the material elements of the crime is a question of law and is reviewable on appeal. While the courts might prefer to avoid the issue, it is, nonetheless, one that must be faced and decided. In the absence of some evidence on each material element, the issue assumes constitutional proportions. The Supreme Court of the United States recently reaffirmed the principle that it is "beyond question, of course, that a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged . . . violate[s] due process."[5] The Indiana courts are not reluctant to meet their constitutional obligations. Upon a showing of such insufficiency, judgments of conviction are reversed.[6]

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[4]In *In re* Winship, 397 U.S. 358 (1970), the Court held that the requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt is a requirement of due process. It should follow that when the record on appeal demonstrates a failure of proof as a matter of law, the convicted person has been denied due process.

[5]Vachon v. New Hampshire, 414 U.S. 478, 480 (1974), *quoting from* Harris v. United States, 404 U.S. 1232, 1233 (1971). *See generally* Thompson v. Louisville, 362 U.S. 199 (1960).

[6]*E.g.*, Melvin v. State, 249 Ind. 351, 232 N.E.2d 606 (1968) (entering to commit a felony); Goodloe v. State, 248 Ind. 411, 229 N.E.2d 626 (1967) (entering to commit a felony); Leitner v. State, 248 Ind. 381, 229 N.E.2d 459 (1967) (entering to commit a felony); Underhill v. State, 247 Ind. 388, 216 N.E.2d 344 (1966) (second degree burglary); Baker v. State, 236 Ind. 55, 138 N.E.2d 641 (1956) (robbery); Mattingly v. State, 230 Ind. 431, 104 N.E.2d 721 (1952) (theft); McAdams v. State, 226 Ind. 403, 81 N.E.2d 671 (1948) (burglary); Steinbarger v. State, 226 Ind. 598, 82 N.E.2d 519 (1948) (possessing burglary tools); Wood v. State, 207 Ind. 235, 192 N.E. 257 (1934) (violation of liquor law). In a few cases the conviction was reversed when the failure of proof related to just one element of the offense, such as the mens rea. *See, e.g.*, Lawson v. State, 257 Ind. 539, 276 N.E.2d 514 (1971) (no evidence of intent in a prosecution for theft on a theory of larceny by finders). More common are those cases in which the failure of proof goes to the entire complex of elements, including both the objective

Reversal of the judgment itself is but a prelude to the problem. The remaining question, one that has not been resolved adequately in Indiana, is the proper disposition of the accused following the reversal for insufficient evidence. Should the appellate court reverse and remand the case for a new trial, or should it enter a judgment of acquittal and order the defendant discharged from further prosecution? Does the appellate reversal for insufficient evidence constitute a judgment of acquittal that can be pleaded in bar of a subsequent prosecution for the same offense? Whether retrial is barred by the constitutional protections against double jeopardy depends upon the answers to these questions.[7]

The arguments favoring application of the double jeopardy clause to appellate reversals for insufficient evidence are compelling. At the first trial the State exercised its opportunity to convict the accused and, as a matter of law, the evidence failed to establish guilt. Should the State be given the opportunity to buttress its case at a second trial or, for harassment only, seek a second guilty verdict on the same insufficient evidence?[8] By

conduct and subjective intent. *See* Buchanan v. State, 279 N.E.2d 576 (Ind. 1972); Scott v. State, 257 Ind. 643, 277 N.E.2d 790 (1972); Isaac v. State, 257 Ind. 319, 274 N.E.2d 231 (1971); Bond v. State, 257 Ind. 95, 272 N.E.2d 460 (1971); Lloyd v. State, 256 Ind. 414, 269 N.E.2d 389 (1971); Lipscomb v. State, 254 Ind. 642, 261 N.E.2d 860 (1970); Seats v. State, 254 Ind. 457, 260 N.E.2d 796 (1970); Sharp v. State, 254 Ind. 435, 260 N.E.2d 593 (1970); Amaro v. State, 251 Ind. 88, 239 N.E.2d 394 (1968); Pace v. State, 248 Ind. 146, 224 N.E.2d 312 (1967); Robertson v. State, 231 Ind. 368, 108 N.E.2d 711 (1952); Wheat v. State, 195 Ind. 660, 146 N.E. 581 (1925); Cavender v. State, 126 Ind. 47, 25 N.E. 875 (1890).

[7]The plural is used to emphasize the fact that the accused may look to both the Constitution of the United States and the Constitution of Indiana. The double jeopardy provision of the fifth amendment to the United States Constitution applies to state prosecution. Benton v. Maryland, 395 U.S. 784 (1969). Double jeopardy is also proscribed by Article 1, section 14 of the Indiana Constitution.

[8]Avoiding the harassment and expense of multiple prosecutions is as much a part of the unindulging policy against double jeopardy as is the threat of multiple convictions. Mr. Justice Black described the policy of the double jeopardy clause:

> [T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88 (1957). Of course, the State is not limited, in the event of a new trial, to the same evidence adduced at the former proceeding. New evidence my be presented and new offenses arising out of the same transaction may be charged. *See* United States v. Ewell, 383 U.S. 116 (1966).

reason of the insufficiency the judgment of conviction was reversed. Clearly, the defendant should have been acquitted in the trial court, and that acquittal would have barred a second trial for the same offense. Logic would dictate a similar result when the acquittal comes at the appellate level, for it is a miscarriage of justice that the defendant was not acquitted at trial. The traditional view, however, permits a second trial for the same offense following reversal on appeal for insufficient evidence. Such cases have been remanded for retrial in a majority of jurisdictions, including Indiana. But the tides of change are moving. A growing number of states are accepting the argument that retrial is barred by the double jeopardy clause.

II. Historical Development

A review of early English common law affords little enlightenment on the historical development of the doctrine of appellate acquittal in the United States. Although by the time of Blackstone it was a "universal maxim of the common law of England that no man is to be brought into jeopardy of his life more than once for the same offense,"[9] it was also true that the right to appeal from a conviction in a criminal case was severely limited. According to Blackstone, writs of error generally were available in misdemeanor cases, but only rarely in felony cases punishable by death. More frequently an appeal of a felony conviction was granted to the personal representative of the defendant after his execution, in which case the issue of retrial was moot.[10] Moreover, the writ of error was a rigid common law form pursuant to which only limited issues could be raised in support of reversal.[11]

In the rare case in which the judgment of conviction was reversed, it is not clear that the English courts of appeal were empowered to order a retrial. Some authorities take the position the retrial was not permitted. In *Green v. United States*,[12] Mr. Justice Black declared that, under present English law, appellate courts could order a new trial after an appeal only when the first trial was a complete "nullity" for reasons such as lack of personal

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[9]4 W. Blackstone, Commentaries * 335. It was from this maxim that the special pleas in bar were developed, including the pleas of *autrefoits acquit* and *autrefoits convict*, which became a part of the common law of Indiana. The special pleas of former attainder and pardon allowed at common law in England were never recognized in this state. Clem v. State, 42 Ind. 420, 431-32 (1873).

[10]4 W. Blackstone, Commentaries * 391.

[11]1 J. Stephen, History of the Criminal Law of England ch. 10 (1883).

[12]355 U.S. 184 (1957).

or subject-matter jurisdiction.[13] This analysis is supported by language of the House of Lords in 1964 to the effect that retrial is not allowed "in respect of the same offense after the verdict of guilty has been quashed *on any ground* by the Court of Criminal Appeal."[14]

Whatever the present state of the English law, it is by no means clear that the courts of appeal in earlier times were without power to remand for retrial. According to Blackstone, the general rule was that if a judgment of conviction were reversed on a writ of error, the accused was subject to being tried again on the theory that "he still remains liable to another prosecution for the same offense; for the first being erroneous he never was in jeopardy thereby."[15] Moreover, the rule was applied to cases in which the reversal was on the ground of insufficient evidence as well as when the judgment was reversed for other reasons. Blackstone reported that:

> [I]n many instances where, contrary to evidence, the jury have found the prisoner guilty, their verdict hath been mercifully set aside *and a new trial granted* by the court of kings bench . . . .[16]

Whatever the English common law rule may have been, it seems not to have survived the journey across the Atlantic; the courts on this continent regularly reversed criminal convictions and remanded cases for new trial without resort to English common law authority. In the earlier decisions remand orders were issued without consideration of the potential constitutional double jeopardy question.[17]

The relationship of the double jeopardy clause and retrial after appellate reversal began to develop in 1896 with the decision

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[13]*Id.* at 189 n.7. He further noted, however, that English appellate courts did have the power to substitute a finding of guilt of a lesser offense if warranted by the evidence. *Id.*

The Illinois Court of Appeals in People v. Brown, 99 Ill. App. 2d 281, 299 n.6, 241 N.E.2d 653, 662 n.6 (1968), similarly concluded that English appellate courts could order a new trial only when the first was a complete nullity. It is apparent, however, that the Court was relying primarily on Mr. Justice Black's historical analysis in *Green*.

[14]Connelly v. Director of Public Prosecutions, 2 All E.R. 401, 406 (1964) (emphasis added). In *Connelly*, the House of Lords seemed to accept as a firmly established principle that double jeopardy prohibits retrial in the event of reversal. The precise issue of the case, however, was whether the defendant could be charged in a second prosecution with a different offense arising out of the same criminal transaction as his original conviction and reversal.

[15]4 W. BLACKSTONE, COMMENTARIES * 393.

[16]*Id.* at 361 (emphasis added).

[17]*E.g.*, Hopt v. Utah, 104 U.S. 631 (1882).

in *Ball v. United States.*[18] With little more than a paraphrase of Blackstone,[19] the Court concluded that the defendant could be retried

> because it is quite clear that a defendant, who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment or upon another indictment, for the same offence of which he had been convicted.[20]

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[18]163 U.S. 662 (1896).

[19]*See* note 15 *supra* & accompanying text.

[20]163 U.S. at 672. The underlying theory of *Ball* is that the defendant waived his double jeopardy defense to a second trial by taking affirmative action to have the judgment of conviction set aside. All of the states, including Indiana, have adopted this waiver concept. *See generally* Morgan v. State, 13 Ind. 215 (1859). Thus, the act of taking a direct appeal and obtaining a reversal of the judgment is a waiver of the defense. *E.g.*, United States v. Tateo, 377 U.S. 463 (1964); Louisana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947); Layton v. State, 251 Ind. 205, 240 N.E.2d 489 (1968); State v. Balsley, 159 Ind. 395, 65 N.E. 185 (1902); Joy v. State, 14 Ind. 139 (1860). *See also* Malone v. State, 179 Ind. 184, 100 N.E. 567 (1913) (appeal from justice of the peace court). Similarly, if the trial court sustains the defendant's motion to correct errors and orders a new trial, the defense is waived. *See* Eskridge v. State, 281 N.E.2d 490 (Ind. 1972). The defense is waived when the defendant successfully attacks the judgment in a collateral post-conviction proceeding in state court. *See* McDowell v. State, 225 Ind. 495, 76 N.E.2d 249 (1947); State *ex rel.* Lopez v. Killigrew, 202 Ind. 397, 174 N.E. 808 (1931). Also, retrial is permitted on a waiver theory when the conviction is set aside in a federal habeas corpus action. Todd v. State, 229 Ind. 664, 101 N.E.2d 45 (1951). Jeopardy has attached when the court accepts a guilty plea from the accused and a second prosecution is barred. Ledgerwood v. State, 134 Ind. 81, 33 N.E. 631 (1893); Boswell v. State, 111 Ind. 47, 11 N.E. 788 (1887). But if the defendant successfully moves to withdraw the plea, the defense is waived. Ledgerwood v. State, *supra. See also* Joy v. State, 14 Ind. 139 (1860) (defense waived when the defendant's motion in arrest of judgment is sustained).

But the waiver doctrine is not without its limitations. Retrial is limited to those counts upon which the defendant was convicted in the prior proceeding. Thus, when the original charge is in two or more counts and the verdict is on one count only, the silence of the verdict on the other counts is an implicit acquittal precluding a second prosecution. *See* Smith v. State, 229 Ind. 546, 99 N.E.2d 417 (1951); Lucas v. State, 173 Ind. 302, 90 N.E. 305 (1910). In Selvester v. United States, 170 U.S. 262 (1898), the Court recognized the general rule that a silent verdict is an implicit acquittal but held that when the jury returned a verdict on some counts and could not agree as to others, the trial court may accept the partial verdict and the defendant would remain subject to a second prosecution on the counts with respect to which the jury could not agree. Of course, an express acquittal on some counts in the prior proceeding remains a bar to a subsequent prosecution even though a successful appeal is taken with respect to other counts. Benton v. Maryland, 395 U.S. 784 (1969). A second limitation is applied when at the first trial the defendant was convicted of a lesser included offense of

But *Ball* was not a case of insufficient evidence. The basis for appellate reversal was a defect in the sufficiency of the indictment, an error in the nature of a procedural defect.[21] Presumably, the proof at trial was more than sufficient to support the guilty verdict; the appellant did not contend that he should have been acquitted at trial on the merits of the evidence. To the extent that the accused was not entitled to acquittal in the trial court, the *Ball* rationale is defensible. The procedural error merely acted to deny the defendant a fair trial. Accordingly, retrial was an appropriate remedy to correct the error. It is a different matter, however, when the cause for reversal is insufficient evidence since such a reversal is tantamount to a determination that the defendant should have been acquitted at trial.

Nonetheless, in *Bryan v. United States*,[22] the *Ball* rationale was extended to a case in which the judgment was reversed for insufficient evidence. At the close of the Government's case in *Bryan* and at the conclusion of all the evidence, the defendant moved for a judgment of acquittal. These motions were denied, and the defendant was convicted of income tax evasion. The judgment was reversed by the Fifth Circuit Court of Appeals because the evidence was insufficient to support the verdict. The case was then remanded to the district court with instructions to order a new trial. Upon appeal to the Supreme Court the defendant contended that the case should have been remanded with instructions to enter a judgment of acquittal. The Court, however, disagreed. While a major portion of the Court's opinion was concerned with the power granted federal appellate courts by statute and court rules which allowed them to remand for a new trial, short shrift was made of the petitioning defendant's double jeopardy argument:

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the crime charged. If the conviction is set aside on appeal, the defendant may not again be charged with the offense alleged in the first indictment or information. He may only be charged with the lesser offense. Price v. Georgia, 398 U.S. 323 (1970); Causey v. State, 256 Ind. 19, 266 N.E.2d 795 (1971).

[21] *See also* United States v. Tateo, 377 U.S. 463, 465 (1964). In *Tateo* the Court concluded that double jeopardy protection does not preclude retrial when the conviction is set aside because of an error in the proceedings leading to conviction. The qualitative difference between an error in the proceedings and a failure of proof is apparent.

[22] 338 U.S. 552 (1950). The issue could not have been stated more succinctly:

> The important question presented upon this record is whether the Court of Appeals, when it reverses the District Court because the evidence is not sufficient to sustain a conviction, may direct a new trial where a defendant had made all proper and timely motions for acquittal in the District Court.

Id. at 553.

> Petitioner's contention that to require him to stand trial again would be to place him twice in jeopardy is not persuasive. He sought and obtained the reversal of his conviction, assigning a number of alleged errors on appeal, including denial of his motion for judgment of acquittal. ". . . [W]here the accused successfully seeks review of a conviction, there is no double jeopardy upon a new trial."[23]

In further support of its conclusion that the new trial order was a "just and appropriate judgment," the Court noted that a majority of the Fifth Circuit judges were of the opinion that the defect in the evidence could be corrected on retrial. Moreover, one of the judges had dissented "vigorously" upon the ground that the evidence amply supported the defendant's conviction.

The Court in *Bryan* failed to note that the earlier cases upon which it relied involved reversals for procedural irregularities, and the evidence in those cases was sufficient to sustain the judgments.[24] Without considering this distinction, the Court summarily

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[23] *Id.* at 560, *quoting from* Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 462 (1947). It is interesting that the *Ball* decision was not cited by the Court; rather, the opinion cited only the *Ball* progeny, Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947), and Trono v. United States, 199 U.S. 521 (1905). It should also be noted that Mr. Justice Douglas took no part in the consideration or decision of the case.

[24] 338 U.S. at 560. It could well be argued that retrial should be barred even when the reversal is grounded upon a procedural irregularity. The question of the guilt or innocence of the accused has never been a relevant consideration in the application of the double jeopardy defense, so why should the defense only be available in reversals for insufficient evidence when the defendant argues that he should have been acquitted at trial? The underlying policy of the double jeopardy clause is to preclude multiple prosecutions for the same offense without regard to the question of guilt. If it is indeed true that in a criminal prosecution the Government assumes the risks of all the errors of the prosecuting attorney and the trial judge, the ground for reversal would be immaterial. *See* United States v. Sisson, 399 U.S. 267, 289 (1970). Certainly, the Government does assume the risk of all errors favorable to the accused. Thus, if an erroneous judgment of acquittal is entered in favor of the defendant, the prosecution may not appeal. Fong Foo v. United States, 369 U.S. 141 (1962). Why should not the Government also assume the risk of errors that are prejudicial to the accused? If such a rule were adopted, retrial would be precluded in any case in which there is a reversal on appeal. Even those who would not adopt an absolutist approach might be comfortable with a rule that would bar a second trial when the trial judge or prosecutor committed a flagrant error prejudicial to the defendant upon an issue clearly defined by law. In such a case, the accused is put to the expense and ordeal of a second trial solely because of the conduct of the court or prosecutor in clear and obvious disregard of the law. Both the judge and the prosecutor may be viewed as functionaries of the State for whom the system, rather than the accused, should assume responsibility.

applied the rule of *Ball* that a defendant who secures an appellate reversal of his conviction may not claim double jeopardy as a defense to retrial—regardless of the reason for reversal. This decision, however, was not surprising. Although the Court in *Bryan* did not rely upon state court authority to support its decision, all of the state courts which had considered the question by 1950 had found no constitutional infirmity in ordering retrial after appellate determination of evidentiary insufficiency.[25] It was predicted as late as 1964 that most states would continue to follow the *Bryan* rationale.[26]

III. The Erosion of Bryan

In 1955 the *Bryan* rationale came under frontal attack and arguably was overruled. In *Sapir v. United States*[27] the Tenth Circuit Court of Appeals reversed a conviction entered by the trial court and ordered the prosecution dismissed on the ground that the evidence was insufficient to support a conviction. The Government subsequently petitioned the court of appeals to amend its judgment and grant a new trial because of newly discovered evidence. The court granted the petition and ordered a new trial. The defendant argued before the Supreme Court that permitting the Government to obtain a new trial after the appellate order of discharge was a violation of his constitutional protection against double jeopardy. The Solicitor General relied upon *Bryan* and argued that the defendant had waived his double jeopardy protection by seeking reversal of his conviction. Accordingly, he urged that the proper standard governing the grant of new trials was whether a new trial would be "just and appropriate" under the circumstances.

In a brief per curiam opinion the Supreme Court vacated the new trial order and ordered the prosecution dismissed. The majority opinion was nothing more than an order and contained no citation of authorities or discussion of the law. Accordingly, it is impossible to determine the legal rationale for the Court's decision. It is an open question as to whether the Court overruled *Bryan* and

[25]The states that had decided the issue prior to 1950 all permitted retrial. A survey in 1964 found all but one of the eleven states with reported decisions in accord with *Bryan*. *See* Comment, *Double Jeopardy: A New Trial After Appellate Reversal for Insufficient Evidence*, 31 U. Chi. L. Rev. 365, 372 n.31 (1964). The sole exception noted was New Mexico which prohibited retrial. State v. Moreno, 69 N.M. 113, 364 P.2d 594 (1961). In those states in which the question had not been expressly decided, it was assumed that the courts were regularly ordering new trials after reversals for insufficient evidence.

[26]*See* Comment, *supra* note 25, at 372 n.31.

[27]348 U.S. 373 (1955).

determined that retrial after appellate reversal for insufficient evidence was violative of the constitutional prohibition of double jeopardy, or whether retrial under the circumstances and facts of *Sapir* was found by the Court not to be "just and appropriate." In a separate concurring opinion, Mr. Justice Douglas, who had not participated in the *Bryan* decision, flatly stated that:

> The granting of a new trial after a judgment of acquittal for lack of evidence violates the command of the Fifth Amendment that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb."[28]

Under this view, no distinction can be drawn between a defendant who is acquitted by a trial court for lack of evidence and a defendant whose conviction is reversed by an appellate court for lack of evidence. Neither defendant can be compelled to "run the gauntlet" a second time.[29]

In 1957 the Supreme Court was given an opportunity to clarify the meaning of *Sapir*. In *Yates v. United States*,[30] a Smith Act prosecution, the Court reversed the trial court's decision and ordered that five of the fourteen defendants be discharged because the evidence was "clearly insufficient." The cases of the other nine defendants, however, were remanded for a new trial. In so holding, the Court reaffirmed the *Bryan* doctrine:

> [W]e would no doubt be justified in refusing to order acquittal even where the evidence might be deemed palpably insufficient, particularly since petitioners have asked in the alternative for a new trial as well as for acquittal.[31]

More confusion resulted from the Court's opinion in *Forman v. United States*,[32] in which the defendant was tried for income tax evasion and convicted on the basis of an improper jury instruction. Upon appeal to the Ninth Circuit Court of Appeals, the defendant's conviction was reversed with instructions to enter a

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[28] *Id.* at 374.

[29] Two facts should be noted about *Sapir*. All appropriate motions for judgment of acquittal were made. Accordingly, the defendant could not be held to have waived his right to such a judgment by nonaction at the trial court level. Additionally, he did not request a new trial in his prayer for relief on appeal. This seemed to be a significant factor to Mr. Justice Douglas who noted that "if petitioner had asked for a new trial, different considerations would come into play." *Id.*

[30] 354 U.S. 298 (1957).

[31] *Id.* at 328. The majority opinion cited *Bryan* but did not cite *Sapir*. Mr. Justice Black, joined by Mr. Justice Douglas, dissented in part on grounds of double jeopardy. The dissent did not cite *Sapir*. It might also be noted here that in a very real sense the petitioners did not ask for a new trial as alternative relief. It was their lawyer who made the request. See note 67 *infra* & accompanying text.

[32] 361 U.S. 416 (1960).

judgment of acquittal. The apparent basis for this decision was the mistaken notion that the facts shown at the trial were insufficient to support a conviction under any criminal statute. Upon rehearing the court of appeals modified its order of reversal and directed a new trial on the ground that the evidence would have been sufficient had the case been tried upon a different theory. Accordingly, the impropriety of the jury instructions rather than insufficiency of the evidence was the ground for reversal. The Supreme Court affirmed the court of appeals' order granting a new trial and attempted to reconcile the inconsistencies of *Bryan* and *Sapir*. Citing *Ball* and *Bryan* for the general proposition that a person can be tried a second time for an offense when his conviction is set aside on appeal, the Court implicitly recognized the validity of *Sapir* but factually distinguished it from *Forman*. The Court noted that *Forman* involved the propriety of jury instructions and the insufficiency of the evidence was not considered. Moreover, in *Forman* the defendant specifically requested new trial relief.[33]

As a consequence of the Court's decisions in *Yates* and *Forman*, the impact of *Sapir* in the federal courts remains obscured. For the most part, the lower federal courts have continued to apply *Bryan* and have remanded cases for new trial after appellate reversal for insufficient evidence.[34] A growing number of state courts, however, are accepting the rationale of the concurring opinion in *Sapir* as an unequivocal bar to retrial. Beginning with the New Mexico Supreme Court in 1961,[35] the doctrine of appellate acquittal has been adopted in other states[36] and

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[33]

> While petitioner contends that here the action of the Court of Appeals on rehearing was based on new evidence, as in *Sapir*, this is incorrect. Here there was no lack of evidence in the record. As the Court of Appeals pointed out, "The jury was simply not properly instructed." 264 F2d at 956. On the other hand, the order to dismiss in *Sapir* was based on the insufficiency of the evidence, which could be cured only by the introduction of new evidence, which the Government assured the court was available. Moreover, Sapir made no motion for a new trial in the District Court, while here petitioner filed such a motion. That was a decisive factor in Sapir's case.

Id. at 425-26.

[34]*E.g.*, United States v. Koonce, 485 F.2d 374 (8th Cir. 1973).

[35]State v. Moreno, 69 N.M. 113, 364 P.2d 594 (1961). The court states the rationale as follows: "The effect of a reversal for lack of sufficient evidence to support a conviction is not different from an acquittal by the jury and requires that the defendant be discharged." *Id.* at 115, 364 P.2d at 596.

[36]State v. Torres, 109 Ariz. 421, 510 P.2d 737 (1973) (retrial for the same offense barred although the accused may be charged with a different offense arising out of the same transaction); Hervey v. People, 495 P.2d

a new judicial trend has been established.[37] Of course, all of the cases from *Ball* through *Forman* arose from federal criminal prosecutions and were decided before the double jeopardy clause of the fifth amendment was made applicable to the states through the fourteenth,[38] and the extent to which they might be binding upon state courts has not been determined.[39] Nonetheless, the state courts that have precluded retrial following appellate reversal for insufficient evidence have relied upon *Sapir* as persuasive authority if not as a constitutional mandate. Moreover, if the Court were faced with the issue again, it is doubtful, at least in a federal case, whether it would continue to follow the *Bryan* rationale. The logic of the state court decisions and the emerging doctrine of appellate acquittal which has developed after the decision in *Forman* is irrefutable. And the Court has not been reluctant in recent years to expand the application of the double jeopardy protection.[40]

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204 (Colo. 1972); People v. Brown, 99 Ill. App. 2d 281, 241 N.E.2d 653 (1968). In Florida, the court will reverse and permit retrial in cases in which the evidence is legally sufficient but very weak. If, however, the evidence is legally insufficient retrial is barred. Sosa v. Maxwell, 234 So. 2d 690 (Fla. Ct. App. 1970); Smith v. State, 239 So. 2d 284 (Fla. Ct. App. 1970). In those states which have not explicitly decided the issue, the courts regularly reverse and order the defendant discharged without discussion of the double jeopardy issue. *See* People v. Hubbard, 19 Mich. App. 407, 172 N.W.2d 831 (1969).

[37]The trend is recognized even by those courts refusing to adopt it. In Gray v. State, 254 Md. 385, 388, 255 A.2d 5, 9 (1969), *cert. denied*, 397 U.S. 944 (1970), the court, although refusing to indorse the new principle, observed:

> We perceive, however, some judicial tendency or trend towards recognition of the logic of appellate direction for the entry of a judgment of acquittal if the state fails to prove its case in the trial court.

[38]The double jeopardy clause was made applicable to the states in Benton v. Maryland, 395 U.S. 784 (1969).

[39]The mere fact that the fourteenth amendment prohibits double jeopardy does not necessarily mean that the requirements of fourteenth amendment due process are coextensive in scope with fifth amendment double jeopardy. In Johnson v. Louisiana, 406 U.S. 356, 366 (1972), Mr. Justice Powell in his concurring opinion argued that the sixth amendment jury trial right was not fully applicable to the states through the fourteenth amendment in all of its essential attributes even though the basic rudiments of a jury trial could not be denied. It is possible that a similar result could be reached with respect to the fifth amendment double jeopardy clause.

[40]*See, e.g.*, United States v. Jorn, 400 U.S. 470 (1971); Moon v. Maryland, 398 U.S. 319 (1970); Ashe v. Swenson, 397 U.S. 436 (1970); Waller v. Florida, 397 U.S. 387 (1970); Benton v. Maryland, 395 U.S. 784 (1969); North Carolina v. Pearce, 395 U.S. 711 (1969). It might also be noted that Mr. Chief Justice Burger authored the majority opinions in both Price v. Georgia, 398 U.S. 323 (1970), and Waller v. Florida, *supra*.

IV. Problems of Waiver

The essence of the *Bryan* rationale is waiver. Because the defendant has chosen to seek and obtain a reversal of his conviction, the right to object to retrial is waived. In addition, at least two other waiver problems exist in the context of reversals for insufficient evidence. The first is suggested by those Indiana decisions which indicate that the right to appellate acquittal may be waived by failure to request a directed verdict at the trial. In addition, the concurring opinion in *Sapir* suggests that appellate acquittal may be waived if the appellant seeks a new trial as alternative relief on appeal. Although some courts have relied on these concepts of waiver to justify retrial, none is properly applicable to the appellate acquittal situation. Like the *Bryan* rationale, these waiver problems should disappear with the passage of time and the refinement of judicial logic.

The Indiana Supreme Court has not decided that the double jeopardy clause bars retrial after an appellate court determination of insufficient evidence,[41] although in a concurring opinion Justice DeBruler has argued that "successive trials of this nature may well violate the rights of this defendant granted to him by the double jeopardy clause of the Fifth Amendment to the United States Constitution."[42] But a majority of the court is not in accord, and the practice of remanding cases for retrial continues.

Nonetheless, a review of the Indiana cases reveals a puzzling inconsistency. In some cases in which appellate courts have found the evidence insufficient, the defendant's case has been remanded for a new trial. In others the appellants were ordered discharged from further prosecution. A close reading of these cases suggests that an appellate order of discharge may be contingent upon whether a proper motion for a directed verdict of acquittal was made in the trial court. In many decisions in which it is disclosed that such a motion was made at trial, the defendants were ordered discharged.[43] In other decisions reversed for insufficient

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Several years after *Sapir* the Court held in Fong Foo v. United States, 369 U.S. 141 (1962), that a judgment of acquittal erroneously entered by the trial court bars retrial even though the court on appeal finds the evidence more than sufficient to support a conviction.

[41]The only statement that could be viewed as an enunciation of a standard to determine retrial is contained in Banks v. State, 257 Ind. 530, 539, 276 N.E.2d 155, 160 (1971), in which the court stated that "there being nothing in the record to indicate that the evidential deficiency might be supplied upon a retrial, we direct that the defendant be discharged."

[42]Lloyd v. State, 256 Ind. 414, 417, 269 N.E.2d 389, 390 (1971).

[43]In Pace v. State, 248 Ind. 146, 224 N.E.2d 312 (1967), the judgment was reversed without remand upon the determination that the defendant's motion for a directed verdict should have been sustained. Similarly, in Wood

evidence, in which it does not appear that the defendant requested a directed verdict, the cases were remanded for retrial.[44] Despite the existence of decisions in which discharge was ordered even though on the face of the opinion a motion for a directed verdict of acquittal was not made,[45] it is reasonable to assume that the Indiana Supreme Court considers a timely motion for directed verdict a precondition to discharge.[46]

If a timely motion for a directed verdict is a condition to discharge by an appellate court, it is hardly fair to defendants in the criminal courts that this condition has not been articulated by the Indiana Supreme Court. Clearly, the enunciation of such rules is a basic function of the appellate process.[47] Moreover, the soundness of this principle is subject to serious question. The only basis for differential treatment of appellants who have failed to request a peremptory instruction for directed verdict is that such failure constitutes a waiver of their right to an acquittal at the trial court level.[48] It is difficult to justify this rationale because its effect would be to impose a waiver of appellate relief at a point in the proceeding at which the right to relief in the trial court remains open. By failing to request a directed verdict, the accused has not waived his right to relief in the trial court. Indiana Rule of Trial Procedure 59(A) clearly specifies that insufficent evidence is a ground for a motion to correct errors pur-

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v. State, 207 Ind. 235, 192 N.E. 257 (1934), there was no remand order when the trial court granted the codefendant's request for a directed verdict but erroneously denied the appellant's motion.

[44]*E.g.*, Buchanan v. State, 279 N.E.2d 576 (Ind. 1972); Lloyd v. State, 256 Ind. 414, 269 N.E.2d 389 (1971). It is assumed that no motion for directed verdict was made in these cases.

[45]*See* Hochman v. State, 300 N.E.2d 373 (Ind. Ct. App. 1973); Lawson v. State, 257 Ind. 539, 276 N.E.2d 514 (1971). However, a review of the transcript of these cases might well reveal the fact that a directed verdict request was made, or discharge may have been the result of a finding that the evidential deficiency could not be cured on retrial. *See* note 41 *supra*.

[46]An appropriate motion for judgment of acquittal, the federal equivalent of a directed verdict, was made in *Sapir*. See note 29 *supra*. This may have been a factor in the disposition of that case.

[47]IND. CODE § 35-1-47-12 (IND. ANN. STAT. § 9-2323, Burns 1956).

[48]The present rules of procedure impose significant waiver limitations on appeal. Issues not included in the motion to correct errors are waived pursuant to Trial Rule 59(G). *See, e.g.*, McAfee v. State *ex rel.* Stodola, 284 N.E.2d 778 (Ind. 1972); Smitley v. Egley, 294 N.E.2d 640 (Ind. Ct. App. 1973). Moreover, the issue is waived on appeal if not stated with specificity in the motion. *E.g.*, Goshen City Court v. State *ex rel.* Carlin, 287 N.E.2d 591 (Ind. Ct. App. 1972); Matthew v. State, 289 N.E.2d 336 (Ind. Ct. App. 1972). Trial Rule 59 is applicable to criminal cases through Criminal Rule 16. *See* Cansler v. State, 281 N.E.2d 881 (Ind. 1972).

suant to which the trial court may enter a judgment of acquittal.[49] Failure to request a directed verdict also does not constitute a waiver of the sufficiency issue for purposes of including it in the motion. Moreover, Trial Rule 59(G) contemplates appellate review of every issue included in the motion to correct errors. Application of the waiver doctrine would result in an anomaly: a trial court could enter judgment of acquittal pursuant to a motion to correct errors, but an appellate court could not do so.

The waiver doctrine is also in direct conflict with Indiana statutory law which requires that a defendant be discharged when the judgment is reversed for insufficient evidence:

> When a judgment against the defendant is reversed, and it appears that no offense whatever has been committed, the court rendering such decision on appeal must direct that the defendant be discharged . . . .[50]

It is clear that appellate courts are empowered to grant any appropriate relief, including the entry of a final judgment of acquittal.[51]

There is no substantial difference between a defendant who requests a directed verdict and one who raises the issue for the first time in the motion to correct errors. Both are calling the attention of the trial court to the legal insufficiency of the evidence and are requesting appropriate relief. In either case the trial court is empowered to acquit the accused. A review of the policies underlying the double jeopardy provisions reveals no basis upon which such differential treatment could be grounded. Fundamentally, the State is given one opportunity, and one only, to convict a citizen of a crime.[52] The purpose of the double jeopardy clause is to protect the individual from the hazards of repeated trials and possible conviction for the same offense:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[53]

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[49]Trial Rule 59(E)(2) authorizes the trial court to enter a final judgment of acquittal.

[50]IND. CODE § 35-1-47-13 (IND. ANN. STAT. § 9-2324, Burns 1956).

[51]IND. R. APP. P. 15(M).

[52]The prosecution may not treat a first trial as a "dry run" to test the sufficiency of its case. *See* Ashe v. Swenson, 397 U.S. 436, 447 (1970).

[53]Green v. United States, 355 U.S. 184, 187-88 (1957).

This principle finds expression in a variety of circumstances. For example, when a defendant is acquitted by the trial court because of insufficient evidence, which finding is later found on appeal to have been erroneous, it is axiomatic that the State cannot obtain a new trial.[54] Accordingly, a defendant who was improperly acquitted in the trial court is free from further prosecution. Yet a defendant who was entitled to acquittal in the trial court but was compelled to appeal from an improper conviction may be subjected to retrial. No justification for such disparate treatment exists.[55] This injustice is especially pervasive when an appellant, who was wrongfully convicted, remains in-

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> Thus it is one of the elemental principles of our criminal law that the Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous.

Id. at 188.

The acquittal may result from the verdict of the jury or a directed verdict of acquittal. Where the evidence is insufficient as a matter of law to support a conviction, a directed verdict is proper. *E.g.*, Hardin v. State, 246 Ind. 23, 201 N.E.2d 333 (1964); State v. Overholser, 69 Ind. 144 (1879); State v. Banks, 48 Ind. 197 (1874); State v. Trove, 1 Ind. App. 553, 27 N.E. 878 (1891). Although the State may appeal from a directed verdict of acquittal as a reserved question of law, the judgment of acquittal is not reversed even though the appeal is sustained. *See* State v. Patsel, 240 Ind. 240, 163 N.E.2d 602 (1960); State v. Torphy, 217 Ind. 383, 28 N.E.2d 70 (1940); State v. Kubiak, 210 Ind. 479, 4 N.E.2d 193 (1936); State v. McCaffrey, 181 Ind. 200, 103 N.E. 801 (1914); State v. Overmyer, 294 N.E.2d 172 (Ind. Ct. App. 1973).

In Fong Foo v. United States, 369 U.S. 141 (1962), the district court erroneously entered a final judgment of acquittal and the court of appeals reversed and remanded for a new trial. The Supreme Court vacated the remand order, holding that the judgment of acquittal, once entered, can never be set aside regardless of error, because to do so would put the defendant twice in jeopardy in violation of the Constitution.

Apparently, in Indiana, the State has never contended that it could obtain a new trial in an appeal from an erroneously granted directed verdict. In the case of State v. Robbins, 221 Ind. 125, 46 N.E.2d 691 (1943), the State appealed on a reserved question of law from a directed verdict. In its brief filed in the appeal, the State acknowledged that the judgment could not be reversed. The brief assigned several errors to sustain the appeal though "not to secure reversal of the judgment." Brief for Appellant at 10.

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> We can see no essential difference—except one of unfairness—between a defendant who is acquitted at trial and one who has to appeal to obtain reversal on the ground of insufficient evidence. Surely, it would compound the unfairness to require that the latter also submit to a retrial.

People v. Brown, 99 Ill. App. 2d 281, 293 n.2, 241 N.E.2d 653, 659 n.2 (1968). Arguably, this differential treatment also raises substantial equal protection problems although the opinions of the courts do not characterize the issues as presenting anything but double jeopardy problems.

carcerated pending his appeal because of his inability to make bail. Even though the costs of his legal defense may be borne by the county, an impecunious defendant pays for his retrial through loss of liberty.[56]

Moreover, the effect of the present state of the law could be to afford broader constitutional protection to a defendant who is shown to be prima facie guilty. Even if palpably erroneous, a directed verdict of acquittal at the trial level could protect a guilty defendant from the hazards of retrial after a reversal of the conviction upon appeal.[57] On the other hand, a defendant who is not shown to be prima facie guilty, and who in fact may be innocent, could be subjected to a new trial. Thus, the present state of the law in the context of individual cases is calculated to shield the guilty and persecute the innocent.

Upon what basis is retrial afforded in any case? The rationale of *Ball* and *Bryan* urges that the defendant has waived the double jeopardy protection by his own act of initiating an appeal and succeeding in having the judgment set aside. Indiana decisions have indorsed this principle.[58] But a coerced waiver of this kind is no more than a fiction which has been rejected explicitly in the context of other cases.

In *Green v. United States*,[59] the Court dealt directly with the question of a coerced waiver of double jeopardy protection. In *Green* the defendant was charged with first degree murder but

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[56]The low income defendant may be detained in jail from the time of his original arrest through the process of appeal, and remain in custody through a second trial following appellate reversal. If he is unable to obtain release on bail, he may spend two or three years incarcerated even though the evidence was insufficient to convict.

[57]Fong Foo v. United States, 369 U.S. 141 (1962), bars retrial following a directed verdict of acquittal even though the evidence was more than sufficient to make out a jury question. The one exception to the general rule occurs when the defendant fraudulently procures a judgment for the purpose of frustrating a legitimate prosecution. In such a case retrial is allowed. *See* Peters v. Koepke, 156 Ind. 35, 59 N.E. 33 (1901); Gresley v. State *ex rel.* Neireiter, 123 Ind. 72, 24 N.E. 332 (1889); Halloran v. State, 80 Ind. 586 (1881). The first prosecution, even though fraudulently procured, may bar a subsequent trial if the defendant received the full penalty authorized by law. *See* Watkins v. State, 68 Ind. 427 (1879).

[58]*See* Layton v. State, 251 Ind. 205, 240 N.E.2d 489 (1968); State v. Balsley, 159 Ind. 395, 65 N.E. 185 (1902); Joy v. State, 14 Ind. 139 (1860). *See also* Malone v. State, 179 Ind. 184, 100 N.E. 567 (1913) (appeal from justice of the peace). Similarly, the defendant is subject to retrial if the judgment of conviction is set aside in a collateral proceeding for post-conviction relief. *See* McDowell v. State, 225 Ind. 495, 76 N.E.2d 249 (1947); State *ex rel.* Lopez v. Killigrew, 202 Ind. 397, 174 N.E. 808 (1931). He may be retried following habeas corpus relief in the federal courts. *See* Todd v. State, 229 Ind. 664, 101 N.E.2d 45 (1951).

[59]355 U.S. 184 (1957).

was convicted by the jury of the lesser included offense of second degree murder. On appeal the second degree murder conviction was set aside because it was not supported by the evidence, and the case was remanded for retrial. On remand Green was charged and convicted of first degree murder. At the second trial Green did not argue that he was entitled to discharge from further prosecution by reason of the appellate finding of insufficient evidence. His only contention was that the prior conviction of second degree murder was an implicit acquittal of first degree murder. Willing to submit to a second trial for second degree murder, he urged that the double jeopardy clause was a bar to retrial for the greater offense of murder in the first degree. The Government took the position that Green had waived his right to object to retrial for first degree murder by successfully appealing the conviction of second degree murder.

Recognizing that a waiver of a constitutional right must be voluntary and knowing, the Court rejected the Government's argument. To apply waiver to this situation would coerce the relinquishment of the double jeopardy defense. It is hardly a voluntary waiver to require the accused to forego his defense as the price of taking an appeal.[60]

A defendant convicted on insufficient evidence is in a similar plight. He could, of course, serve his sentence and be free of a subsequent prosecution, but this is hardly an acceptable alternative. If he appeals on the ground that he should have been acquitted at trial, and the appellate court is in accord, why should he be any more subject to retrial than his counterpart who was acquitted at trial? By imposing a coerced waiver of the double jeopardy defense, courts penalize the accused for successfully attacking an erroneous judgment. The extension of the *Green* rationale to re-

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[60]

> "Waiver" is a vague term used for a great variety of purposes, good and bad, in the law. In any normal sense, however, it connotes some kind of voluntary knowing relinquishment of a right. When a man has been convicted of second degree murder and given a long term of imprisonment it is wholly fictional to say that he "chooses" to forego his constitutional defense of former jeopardy on a charge of murder in the first degree in order to secure a reversal of an erroneous conviction of the lesser offense. In short, he has no meaningful choice. . . .
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> . . . .
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> . . . Conditioning an appeal of one offense on a coerced surrender of a valid plea of former jeopardy on another offense exacts a forfeiture in plain conflict with the constitutional bar against double jeopardy.

Id. at 191-94 (citations omitted). *See also* Price v. Georgia, 398 U.S. 323 (1970); Benton v. Maryland, 395 U.S. 784 (1969).

versals for insufficient evidence would invalidate *Bryan* as a basis for remand and retrial.[61]

More realistically, some courts have discarded the waiver fiction and, while recognizing that retrial does constitute a second jeopardy, would nonetheless permit it in some instances as a matter of policy. These courts balance a defendant's right to a fair trial against society's need to punish the guilty and conclude that retrial serves both interests well.[62] This rationale, however, is based upon the questionable assumption that society has a legitimate interest in the multiple prosecutions of a defendant against whom a prima facie case was not established at the first trial.

Different considerations are apparent with respect to reversals for reasons other than insufficient evidence. For example, when a reversal is based upon improper jury instructions or some pretrial procedural irregularity, a defendant may have been denied a fair trial even though the evidence of guilt was overwhelming. It is far better that a defendant be given a fair trial upon remand than to extend the harmless error doctrine as a basis for affirmance. In such a case, the accused was not entitled to acquittal in the trial court, nor should such relief be afforded in the appellate court. The security of the community at large may be preserved by a new trial while also securing the defendant's right to a fair trial. The defendant who is not shown to be prima facie

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[61]The Supreme Court has not been called upon to reconcile the *Green* decision with *Bryan*. Since *Bryan* was grounded upon the same waiver concept that was later rejected in *Green*, it is reasonable to assume that *Bryan* would be overruled if challenged.

[62]In United States v. Tateo, 377 U.S. 463, 466 (1964), Mr. Justice Harlan argued that appellate courts would be very reluctant to reverse a conviction if retrial were not available:

> While different theories have been advanced to support the permissibility of retrial, of greater importance than the conceptual abstractions employed to explain the *Ball* principle are the implications of that principle for the sound administration of justice. Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendant's rights as well as society's interest.

Of course, a literal construction of the Federal and Indiana Constitutions would never permit a second jeopardy regardless of society's interest in punishing the guilty.

guilty, however, in theory, represents no threat to the community. Whether the defendant in such a case is acquitted at trial or upon appeal should make no difference. In either case the accused should not be retried.[63]

Moreover, the security of the community, preserved by the imposition of criminal sanctions, has never been the sole consideration of our criminal justice system. Even though defendants may be guilty, countervailing policies immunize from prosecution those who have been denied their rights to speedy trials or who have not been brought to justice within the statutory period. If public policy requires retrial of defendants acquitted upon appeal, it can also be argued that the same policy requires retrial of defendants acquitted in the trial court. In either case, the State may be able to develop additional evidence sufficient to support a conviction.[64] The double jeopardy bar, however, was explicitly designed to prohibit this kind of continuing persecution of the accused.[65]

A final waiver problem was generated, perhaps inadvertently, by the concurring opinion in *Sapir* in which it was noted that the appellant had not asked for new trial relief. "If petitioner had asked for a new trial, different considerations would come into play, for then the defendant opens the whole record for such disposition as might be just."[66] This language has been construed to mean that a defendant who requests a new trial, even as alternative relief, has waived his right to discharge at the appellate level if the evidence is determined to be insufficient. In *Forman* the Court distinguished *Sapir* in part on the ground that petitioner had made a motion for a new trial, while in *Sapir* no such motion was made.[67] Again, this is hardly a "voluntary" waiver as defined in *Green*. To hold that an appellant must limit his appeal to

[63]This was the position of the court in People v. Brown, 99 Ill. App. 2d 281, 241 N.E.2d 653 (1968), in which it was held that the reason for the reversal should control the decision as to whether or not there should be a retrial. It is reasonable to argue that the relief properly afforded on appeal is that to which the defendant was entitled at trial. A new trial is appropriate when the accused was denied a fair trial while appellate acquittal is proper when acquittal was erroneously denied below.

[64]If retrial is permitted following appellate reversal "the Government is not limited at a new trial to the evidence presented at the first trial," and new evidence may be introduced to buttress the case for the prosecution. United States v. Shotwell Mfg. Co., 355 U.S. 233, 243 (1957). Additionally, the prosecution may charge new or different offenses arising out of the same transaction. *See* United States v. Ewell, 383 U.S. 116 (1966).

[65]The policy against multiple prosecutions is reflected in Downum v. United States, 372 U.S. 734 (1963), in which the jury was discharged at the commencement of trial because the prosecution's key witness was absent.

[66]348 U.S. at 374.

[67]361 U.S. at 426.

the sole issue of sufficiency, or, in the alternative, waive his right to appellate acquittal is to coerce the relinquishment of a constitutional right. It is a rare case indeed in which counsel would not want to argue procedural error on appeal in addition to the question of the sufficiency of the evidence. Moreover, such a waiver would be particularly inconsistent with appellate practice in Indiana. The recently adopted rules of procedure abolish the motion for a new trial and supplant it with the motion to correct errors for the express purpose of permitting the consolidation of every specification of error into a single motion.[68] Even though a new trial may not be the appropriate relief for each specification, Trial Rule 59(E) expressly empowers a court to enter all appropriate relief including both the entry of a final judgment and the grant of a new trial. Moreover, the only court since *Forman* to consider the waiver issue firmly rejected its application when the appellant sought discharge or new trial as alternative relief on appeal.[69]

V. Conclusion

It is anticipated that the doctrine of appellate acquittal will gain widespread acceptance and eventually become the majority view if indeed the Supreme Court does not first overrule *Bryan* and make the doctrine applicable to the states through the fifth and fourteenth amendments. Further litigation, however, will be required to define the full scope and application of the doctrine. When the evidence at trial is insufficient to prove the commission of any crime, it is not difficult to conclude that an appellate court should enter a judgment of acquittal and order the defendant discharged from further prosecution. What should an appellate court do, however, when the evidence in the record is insufficient to prove the crime charged but is more than sufficient to prove a different offense? If the second crime is one that is a lesser included offense of the crime charged, the appellate court may simply modify the judgment and sustain the conviction for the lesser included offense.[70] If it is not a lesser included offense, however, the judgment of conviction may not be modified; it is a violation of due process of law to convict a person of a crime with which he is not charged.[71] Accordingly, an appellate court would be re-

[68]Indiana Civil Code Study Comm'n, Indiana Rules of Civil Procedure Rule 59, Comments (1968) (proposed final draft).

[69]People v. Brown, 99 Ill. App. 2d 281, 298-99, 241 N.E.2d 653, 661-62 (1968). Moreover, if the rule were applied, it could well be argued that the appellant received inadequate representation by his counsel who waived the defense without the client's full knowledge and consent.

[70]*See* Ritchie v. State, 243 Ind. 614, 189 N.E.2d 575 (1963).

[71]*E.g.*, Cole v. Arkansas, 333 U.S. 196 (1948).

quired to reverse the judgment of conviction, and the doctrine of appellate acquittal would preclude retrial of the defendant for the crime with which he was charged. It does not necessarily follow, however, that he could not be retried for the different offense. The traditional view holds that the defendant was never in jeopardy of the different offense because it was not charged and, therefore, the defendant could be subjected to a second trial.[72] This would be a proper result in view of the fact that, with respect to the different offense, the reversal is based upon the inadequacy of the indictment rather than insufficiency of the evidence.

A more serious problem is raised by the case in which the evidence in the record is insufficient, but the trial court erroneously excluded evidence for the State which would have cured the defect. Arguably, the State should be given a second opportunity to convict the accused since he would not have been entitled to appellate acquittal absent the error of the trial judge. Retrial would be, however, contradictory to the underlying purpose of appellate acquittal—to grant the appellant the relief to which he was entitled in the trial court. Since, on the basis of the record evidence, the defendant was entitled to a judgment of acquittal at the conclusion of the trial, the same relief should be made available on appeal. Moreover, an error committed by the trial judge, prejudicial to the prosecution, does not in every case justify a second trial. In *Fong Foo v. United States*,[73] the Supreme Court refused to permit a second trial when the trial judge erroneously granted a motion for judgment of acquittal. A similar result should obtain in the case in which the trial judge erroneously excludes evidence for the State.[74] The defendant should never be subjected to a second trial if, at the conclusion of the first proceeding, he was entitled to acquittal on the basis of the record evidence.

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[72] *Cf.* Fritz v. State, 40 Ind. 18 (1872); Joy v. State, 14 Ind. 139 (1860). These cases enunciate the general rule that when the charge is so defective that a valid judgment of conviction may not be entered under it, the defendant is not put in jeopardy thereby. One of the underlying purposes of requiring specificity in the criminal charge is to insure that a judgment on the charge may be pleaded in bar of a subsequent prosecution for the same offense. *E.g.*, Fletcher v. State, 241 Ind. 409, 172 N.E.2d 853 (1961); Bruce v. State, 230 Ind. 413, 104 N.E.2d 129 (1952); McCloskey v. State, 222 Ind. 514, 53 N.E.2d 1012 (1944); Garrison v. State, 208 Ind. 690, 193 N.E. 587 (1935); State v. Brown, 208 Ind. 562, 196 N.E. 696 (1935); Foust v. State, 200 Ind. 76, 161 N.E. 371 (1928); Brockway v. State, 192 Ind. 656, 138 N.E. 88 (1923); Mayhew v. State, 189 Ind. 545, 128 N.E. 599 (1920); Skelton v. State, 173 Ind. 462, 89 N.E. 860 (1909); McLaughlin v. State, 45 Ind. 338 (1873); State v. Trueblood, 25 Ind. App. 437, 57 N.E. 975 (1900).

[73] 369 U.S. 141 (1962).

[74] *See* United States v. Sisson, 399 U.S. 267, 289 (1970) (State assumes the risk of errors by the prosecuting attorney or the trial court). See also note 24 *supra*.

While these and other questions will be raised in Indiana after adoption of the appellate acquittal doctrine, one must presently await clarification by the Indiana Supreme Court of the underlying double jeopardy issue. One would hope that it will not be long in coming.

Notes

Discharge of Certain Parties to Negotiable Instruments Upon a Holder's Impairment of Collateral

I. Threshold Issues

Section 3-606(1)(b)[1] of the Uniform Commercial Code (UCC) discharges certain parties to a negotiable instrument when a holder "unjustifiably impairs" collateral given for the instrument. This Note discusses which parties can take advantage of this right to discharge, against which holders the right can be asserted, and what acts constitute such unjustifiable impairment of collateral. The questions of which parties come within section 3-606(1)(b) and against which holders the section is available are known as threshold issues. The considerations applicable to these threshold issues are the same as for the threshold issues involved in the other special suretyship defenses, which are found in section 3-606(1)(a).

Section 3-606 as a whole is an expansion and clarification of section 120[2] of the Negotiable Instruments Law (NIL). The NIL

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[1] Uniform Commercial Code [hereinafter cited as UCC] § 3-606(1) provides in full:

> (1) The holder discharges any party to the instrument to the extent that without such party's consent the holder
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> (a) without express reservation of rights releases or agrees not to sue any person against whom the party has to the knowledge of the holder a right of recourse or agrees to suspend the right to enforce against such person the instrument or collateral or otherwise discharges such person, except that failure or delay in effecting any required presentment, protest or notice of dishonor with respect to any such person does not discharge any party as to whom presentment, protest or notice of dishonor is effective or unnecessary; or
>
> (b) unjustifiably impairs any collateral for the instrument given by or on behalf of the party or any person against whom he has a right of recourse.

[2] Uniform Negotiable Instruments Law [hereinafter cited as NIL] § 120 provides in relevant part:

> A person secondarily liable on the instrument is discharged:
>
> . . . .

distinguished between parties primarily and secondarily liable. The latter category included drawers and indorsers. Since these parties generally stood on the instrument as sureties for primary parties (makers and acceptors), the drafters of the NIL gave secondary parties the right to discharge on the instrument upon certain misdeeds of the creditor-holder which under the general law of suretyship discharged a surety.[3] No specific provision of the NIL extended this right to primary parties. With the exception of the defense of extension of time for payment, however, a number of courts allowed makers and acceptors who signed the instrument as sureties to seek discharge under general suretyship principles.[4]

The distinction between primary and secondary parties was not retained under the UCC. Comment 1 to section 3-606[5] states that the provisions of the section "are not limited to parties who

5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved.

6. By any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved.

[3]W. BRITTON, HANDBOOK OF THE LAW OF BILLS AND NOTES §§ 291-93 (2d ed. 1961) [hereinafter cited as BRITTON]. Impairment of collateral was not mentioned in the NIL as a cause for discharge even of secondary parties. Professor Britton argues, however, that the drafters of the NIL obviously intended to include all of the special suretyship defenses and that the courts dealing with the NIL read section 120 to include the defense of impairment of collateral. These defenses, Professor Britton continues, applied only to secondary parties qua secondary parties, that is, to regular indorsers and drawers. An accommodation drawer or indorser (a party signing specifically as a surety) should technically have sought discharge under the general law of suretyship, incorporated into the NIL by section 196. BRITTON § 293, at 686.

[4]There is some dispute as to the availability to primary parties under the NIL of these special suretyship defenses. *Compare* BRITTON § 301, at 705, *with* 4 S. WILLISTON, THE LAW OF CONTRACTS § 1260 (rev. ed. 1936) [hereinafter cited as WILLISTON].

On suretyship under the NIL, *see generally* BRITTON §§ 290, 291; J. BRANNAN, BRANNAN NEGOTIABLE INSTRUMENT LAW 1114-40, 1148-66 (7th ed. F. Beutel 1948); WILLISTON § 1260; Annot., 74 A.L.R. 129 (1931); Annot., 2 A.L.R.2d 260 (1948); 43 YALE L.J. 1015 (1934).

[5]UCC § 3-606, Comment 1 explains the statutory language concerning which parties are covered by the section:

The words "any party to the instrument" remove an uncertainty arising under the original section. The suretyship defenses here provided are not limited to parties who are "secondarily liable," but are available to any party who is in the position of a surety, having a right of recourse either on the instrument or dehors it, including an accommodation maker or acceptor known to the holder to be so.

are 'secondarily liable.'"[6] Nor does section 3-606 cover only accommodation parties;[7] rather its coverage extends to "any party who is in the position of a surety."[8] A party "in the position of a surety" is classified as any party having a right of recourse either on the instrument or dehors it.[9] Rights of recourse on the instrument arise from any other provision of Article 3 of the UCC. Rights of recourse dehors the instrument flow from other sources of law, especially the general law of suretyship.[10] In either case,

[6] *Id.* For a case under the NIL making the distinction between primary and secondary parties but realizing that the UCC establishes a different test in section 3-606, see Rose v. Homsey, 347 Mass. 259, 197 N.E.2d 603 (1964). Some courts under the UCC still distinguish between secondary parties and non-accommodation primary parties. Commerce Union Bank v. May, 503 S.W.2d 112 (Tenn. 1973); Peoples Bank v. Pied Piper Retreat, Inc., 207 S.E.2d 184 (W. Va. 1974).

[7] With the possible exception of Brunner v. Smith, 467 S.W.2d 565 (Tex. Civ. App. 1971), no case has been found under the UCC denying that accommodation parties are covered by section 3-606.

Arguing a construction of a UCC section from the Comments is somewhat risky. Many courts rely on the Comments, and a clever lawyer always cites them when they support his case, but the Comments are not legislatively enacted. One policy and two textual arguments can be made to support the position of the Comments to section 3-606 and of this Note that section 3-606 includes non-accommodation, non-indorser persons. If section 3-606 applied only to suretyship created on the instrument, the name of the individual accommodated would by definition be required to be on the instrument. In the terms of Article 3, he would need to be a "party." Section 3-606 clearly states, however, that the rights of recourse are against a "person." Also, the rights of recourse of an accommodation party are, again by definition, on the instrument. UCC § 3-415(5). The drafters showed that they distinguished between "right of recourse" and "right of recourse on the instrument" by using the latter phrase in section 3-415(5). In section 3-606(1), the right of recourse is not so qualified.

The policy argument centers on the Code's overall purpose "to simplify, clarify, and modernize the law governing commercial transactions." UCC § 1-102(2)(a). Although a majority of courts under the NIL disallowed suretyship dehors the instrument, scholarly opinion was in favor of allowing recourse dehors the instrument for purposes of establishing discharge under the special suretyship defenses. See note 76 *infra*. A broad reading of the scope of section 3-606(1) thus favors what scholars in the field have long considered the better view.

[8] UCC § 3-606, Comment 1.

[9] *Id.*

[10] Accommodation parties have rights of recourse on the instrument as provided in UCC § 3-415(5): "An accommodation party is not liable to the party accommodated, and if he pays the instrument has a right of recourse on the instrument against such party." For a discussion of section 3-415(5), see J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 13-16 (1972) [hereinafter cited as WHITE & SUMMERS].

Non-accommodation indorsers also have rights of recourse on the instrument established by their contracts as indorsers. UCC § 3-414. Non-accommodation makers, drawers, acceptors, and payees may have rights of

before a holder is liable under section 3-606(1)(a), he must have knowledge of the right of recourse.[11] Knowledge is defined by the UCC as actual knowledge.[12]

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recourse dehors the instrument. These rights could arise by suretyship agreement or by operation of law and, in both cases, are created by the general law of suretyship. These rights supplement section 3-606, as provided by section 1-103. See note 17 *infra*.

Rights dehors the instrument may be against parties to the instrument or parties off the instrument. In most of the former cases, an accommodation contract would seemingly have been made. *But see* Oregon Bank v. Baardson, 256 Ore. 454, 473 P.2d 1015 (1970), in which case the court would not allow one co-maker to claim impairment of collateral when he had made an agreement dehors the instrument with the other co-maker that he would be primarily liable on the instrument.

The status of non-accommodation co-makers under section 3-606(1)(b) is more complicated. As parties to the instrument, one or more of them may have established rights of recourse dehors the instrument against a party who gave collateral for the instrument. One or more co-makers may also have made an accommodation contract on the instrument on behalf of another party to it. Arguably, however, a co-maker always has a right of recourse on the instrument against other co-makers for contribution if he pays more than his proportionate share. This right would arise on equitable grounds through section 1-103. WHITE & SUMMERS § 13-14, at 434 n.121. Case law on this point is unsettled. MacArthur v. Cannon, 4 Conn. Cir. Ct. 208, 229 A. 2d 372 (1967) (co-maker liable for contribution); Hallowell v. Turner, 95 Idaho 392, 509 P.2d 1313 (1973) (reservation of rights by one co-maker precluded issue of co-maker's proportionate liability); Blakely v. Schultz, 480 P.2d 428 (Ore. 1971) (issue of co-maker's liability not decided because defendant did not plead it).

Professors White and Summers state that the right of recourse on the instrument arises only after the surety party has paid the instrument. WHITE & SUMMERS § 13-16, at 438 n.136. As a matter of recovery from the principal, this is undeniably correct. This reasoning should not, however, deny a surety party recourse to section 3-606 if he has no right of recourse dehors the instrument and the instrument is not yet due or is due and the surety has not yet paid it. Under general suretyship law the surety obtains certain rights as soon as he becomes bound, which rights are the equivalent of rights of recourse. L. SIMPSON, HANDBOOK ON THE LAW OF SURETYSHIP § 47, at 212-24 (1950) [hereinafter cited as SIMPSON]; *id* § 48, at 235-37.

[11]UCC § 3-606(1)(a).

[12]UCC § 1-201(25). This test is equivalent to one of subjective knowledge. What an individual knows in fact, rather than what he should know from the information given him, is determinative. Since actual knowledge is established generally by showing what one could know from the objective circumstances, that is, from notice, the practical differences between the actual knowledge and notice tests are probably less than the theoretical differences. Unfortunately, section 3-606, Comment 3, in applying the actual knowledge test in the context of that section, seems to make a greater distinction between notice and lack of notice than between knowledge and notice. This seeming disparity between text and comment must be resolved in favor of the clear wording of the text. The ambiguity in section 3-606, Comment 3, may have led one court to suggest that section 3-606 embodies a notice standard. Hallowell v. Turner, 95 Idaho 392, 509 P.2d 1313 (1973).

The defense of impairment of collateral found in section 3-606(1)(b) is available to a party with recourse against one who has caused collateral to be given for the instrument. Additionally, this defense is available to a party without recourse, provided that collateral has been given for the instrument by or on behalf of that party.[13] Although section 3-606(1)(b) has no explicit knowledge requirement, the word "unjustifiably" was probably intended to incorporate the section 3-606(1)(a) standard of the holder's subjective knowledge.[14] Before the special suretyship defense of impairment of collateral can be asserted under general suretyship law, the creditor must know of the suretyship relation.[15] There is no reason to believe the drafters of the UCC intended to establish a lower standard for impairment of collateral cases under the Code. There is also no reason for establishing a lower standard for the impairment of collateral defense vis-à-vis the other special suretyship defenses.

The standard of actual knowledge required in section 3-606 makes unclear the relationship of this section with section 3-415, which contains the basic suretyship provisions of Article 3. Subsection 3-415(3) is central:

> As against a holder in due course and without notice of the accommodation oral proof of the accommodation is not admissible to give the accommodation party the benefit of discharge dependent on his character as such. In other cases the accommodation character may be shown by oral proof.

The subsection can be read in two ways. Considered as a rule of substantive law, it reduces for accommodation parties the element of the holder's subjective knowledge required for asserting discharge under section 3-606 to an element of notice as to holders

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[13]UCC § 3-606(1)(b). *See* Peoples Bank v. Pied Piper Retreat, Inc., 207 S.E.2d 184 (W.Va. 1974), discussed at note 43 *infra*.

[14]Section 3-606, Comment 3, gives no indication other than establishing for section 3-606(1)(b) the same standard of knowledge as for section 3-606(1)(a), although the Comment may erroneously suggest that a notice standard applies to section 3-606.

[15]WILLISTON § 1220, at 3510. Professor Simpson states that the creditor's knowledge of the suretyship relationship is necessary before the impairment of collateral defense of release of the security can be asserted. SIMPSON § 74, at 373. It follows that the more burdensome creditor duties which could be considered impairment of collateral under section 3-606(1)(b) would also require the holder-creditor's actual knowledge of the suretyship relationship. *But see* A. STEARNS, THE LAW OF SURETYSHIP § 6.46, at 184 (5th ed. J. Elder 1951) [hereinafter cited as STEARNS]. Although it is stated that the creditor's knowledge of the suretyship relationship is not required for the creditor to impair the collateral, the authority cited for this rule consists of more cases that hold against the stated rule than hold for it. *Id.* at 184 n.71.

in due course and, by negative implication, completely abolishes this element as to non-holders in due course. Considered as a rule of procedure, the section merely states against whom an accommodation party may assert defenses leading to discharge. A party would first be required to establish his accommodation status under the section 3-415(3) rules for introducing proof of accommodation status.[16] The party would then have to prove against any holder, whether or not a holder in due course, the elements of any special suretyship defense.[17]

Interpreting section 3-415(3) as a rule of procedure avoids the inequitable result of allowing an accommodation party to seek discharge upon the holder's notice of the accommodation, while requiring a non-accommodation party in the position of a surety to establish the holder's actual knowledge of the suretyship status. Otherwise, since notice can be established in more ways than can actual knowledge, accommodation parties would theoretically at least obtain discharges under the special suretyship defenses more easily than non-accommodation surety parties.

If section 3-415(3) were read as a rule of substantive law, accommodation parties would sue under section 3-415 rather than under section 3-606, because, as discussed above, discharge would be more readily available under the former section. This would make section 3-606 superfluous for accommodation parties, who comprise a large number of the prospective litigants ostensibly

[16]Section 3-606 and section 3-415(3) considered as a rule of procedure will still not interrelate without contradiction if section 3-415(3) is read to require that a holder in due course have notice of a party's accommodation status before he takes the instrument. However, such a qualification does not appear in the text of section 3-415(3). Evidently, when this restriction on the liability of a holder in due course was intended by the drafters of the UCC, they explicitly stated it in the section. *See* UCC §§ 3-602, 3-119(1). Policy considerations support the absence of this limitation in section 3-415(3). Having a surety for the debt embodied by the instrument can only benefit the holder. A holder will discharge a surety only when the holder's conduct is inequitable towards the surety and, before this inequitable conduct can occur, the holder must have knowledge of the suretyship relationship. See note 76 *infra*.

[17]For further analysis of the relationships between sections 3-415(3) and 3-606, see Peters, *Suretyship Under Article 3 of the Uniform Commercial Code*, 77 YALE L.J. 833, 868-76 (1968).

Any suretyship defenses found allowable in a direct suit under section 3-415(3) would be asserted via section 1-103 from the general law of suretyship. Section 1-103 incorporates into the UCC the great body of commercial common law. Outside law "supplements" the UCC provisions unless "displaced" by the particular provision in question. For a discussion of the defenses other than the special suretyship defenses that a surety-party could assert under section 3-415, see WHITE & SUMMERS § 13-17.

brought within the provisions of the section.[18] Furthermore, the text and comments to section 3-606 specifically extend the section to apply to accommodation parties.[19] The fact that accommodation parties are specifically covered by the provisions of section 3-606 limits these parties to that section as a source of substantive law for the defenses it contains. Otherwise, contradictory results could be obtained on the same facts by applying different sections of Article 3.

Even if section 3-415(3) is construed as a rule of procedure, conflicts could arise between that section and section 3-606. A party could sue under section 3-415(3) by incorporating into the section via section 1-103 one of the special suretyship defenses available under the general law of suretyship. If the elements of the defense at common law are more lenient than those established under section 3-606, similar problems would arise as if section 3-415(3) were considered a rule of substantive law. The same arguments given above against such a construction of section 3-415(3) should prevail against a party who seeks to circumvent the section 3-606 standards by suing under sections 3-415 and 1-103.

Many courts have had difficulties analyzing and applying these threshold issues. In *Brunner v. Smith*,[20] for example, Brunner became an accommodation co-maker for Steele when the bank showed Brunner $30,000 worth of stock pledged to the bank by Smith on behalf of Steele. The bank sold the note before maturity to Smith, who had judgment against both makers for $11,238.44, the full amount of the note.

Brunner appealed, seeking not discharge but a setoff of the collateral. The Texas Court of Civil Appeals may have reached a correct decision but incorrectly analyzed the issues and misapplied the relevant Code provisions. The court found that Brunner was a maker because there was "nothing on the face of the note to the contrary."[21] Sections 3-415(1), (2), and (5) were cited, evidently to support the proposition that a maker is liable to a holder regardless of the maker's accommodation status.[22] As a maker, Brunner was himself "accommodated" by the pledge and thus had no rights to it.[23] Neither section 3-606(1)(b) nor impairment of collateral were mentioned by the *Brunner* court. Nor was there

[18]UCC § 3-606, Comments 1, 3. The use of "right of recourse" in the text of both section 3-415(5) and section 3-606(1) links the two sections.

[19]Although section 3-606 should not be limited to accommodation parties, in many cases arising under section 3-606 the parties seeking discharge will be accommodation parties.

[20]467 S.W.2d 565 (Tex. Civ. App. 1971).

[21]*Id.* at 567.

[22]*Id.*

[23]*Id.*

any discussion of whether Smith knew of the accommodation of Steele by Brunner.

The issue of subjective knowledge or notice as the standard for asserting the special suretyship defenses pervades the opinion; yet this issue is never spelled out because the context in which it would be relevant is never clarified. The court further erred in not distinquishing betwen initial and ultimate liability. It correctly stated that, like any other party to a negotiable instrument, an accommodation party is liable in the capacity in which he signs the instrument.[24] The court failed to continue, however, and to state further that from this position an accommodation party can raise defenses under section 3-415 or section 3-606, provided that he can meet the tests established by these sections for inclusion in the class covered.

From the facts given, the court should have found that Brunner was an accommodation party under section 3-415(1). This would have given Brunner recourse on the instrument. Brunner could then have attempted to establish against Smith his discharge by the bank under section 3-606(1)(b). In addition to proving the bank's actual knowledge of his right of recourse against Steele and to showing an act of impairment by the bank, Brunner would have been required to prove either Smith's notice of Brunner's discharge or Smith's lack of holder in due course status.[25] Alternatively, Brunner could have tried to prove that Smith was himself the impairing holder. Section 3-415(3) would not have been a bar. In establishing impairment of collateral by Smith, Brunner would have had to show Smith's actual knowledge of Brunner's

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[24]UCC § 3-415, Comment 1.

[25]UCC § 3-602 establishes when a party can assert against the present holder his discharge by a previous holder: "No discharge of any party provided by this article is effective against a subsequent holder in due course unless he has notice thereof when he takes the instrument." Notice on the instrument of the suretyship relationship and notice of the facts giving rise to the discharge should be sufficient to bind the present holder. Under a notice standard, a party is conclusively presumed to know the legal effects of the circumstances of which he is notified. Of course, notice on the instrument should not be required if the present holder had actual knowledge of the suretyship relationship, arising either on the instrument or dehors it, and had actual knowledge of the discharge, since notice includes actual knowledge. UCC § 1-201(25)(a).

In Rushton v. U.M. & M. Credit Corp., 245 Ark. 703, 434 S.W.2d 81 (1968), an accommodation party was denied discharge from the previous holder's failure to perfect a security given for the note because the subsequent holder was a holder in due course who had no notice that the security interest had not been perfected. Sections 3-606(1)(b) and 9-207(1) were mentioned but were not controlling. Section 3-602 was not mentioned. The opinion gave an alternate reason for the holding. See note 43 *infra*.

right of recourse. Since knowledge constitutes notice,[26] Brunner, at the same time, would have been establishing his right to assert any defense against Smith under a reading of section 3-415(3) as a rule of procedure.

II. Problems Arising Specifically Under Section 3-606(1)(b): Fleshing Out the Code

A. General Considerations

Unlike the special suretyship defenses listed in section 3-606 (1)(a), which exist as separate and distinct rights in suretyship law, the term "unjustifiably impairs collateral" refers to no specific act. Although there is substantial agreement among the jurisdictions, each jurisdiction has its own collection of creditor misdeeds which can reasonably be considered included within section 3-606(1)(b). Commentators[27] arrange these individual defenses into three general categories, which are, in order from most likely available to least available: (1) affirmative acts relating to the collateral such as release of the pledge or other security, (2) negligent dealings with the collateral such as failure to take slight affirmative action to preserve or protect it, and (3) failure to take relatively burdensome steps to preserve or protect the collateral.

The word "impairs" seems itself sufficiently pejorative to encompass acts included in any of these categories. The "unjustifiably" modifying "impairs" must therefore limit rather than expand the scope of section 3-606(1)(b). "Unjustifiably" certainly includes some kind of knowledge requirement.[28] It also was probably meant to incorporate the common law rule that a creditor does not discharge a surety by impairing collateral when sufficient collateral remains to pay the debt.[29] Furthermore, the word points to the need for a standard. A creditor-holder will not himself become a surety or insurer; there is some lower level of duty for which he will be held accountable.

When faced with fleshing out the meaning of the undefined term "unjustifiably impairs collateral" of section 3-606(1)(b), courts essentially have three approaches. First, they can incorporate into the section the specific acts available as a defense in their jurisdiction under any of three categories listed above. Secondly,

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[26]UCC § 1-201(25)(a).

[27]*See generally* 74 Am. Jur. 2d *Suretyship* §§ 87, 89, 92, 93 (1974); Britton § 292; 72 C.J.S. *Principal and Surety* §§ 197, 200, 203 (1957); Simpson §§ 74, 75; Williston §§ 1232, 1233.

[28]See text accompanying notes 11-16 *supra*.

[29]Simpson § 74, at 372.

they can determine a standard of creditor's care drawn from the cases and establish it as the Code standard. Thirdly, they can create a body of decisions about section 3-606(1)(b) by testing any act alleged to be "unjustifiable" against an applicable Code standard.

In adopting the third approach, courts have been faced with a problem in semantics and statutory construction which is best illustrated by the case of *Shaffer v. Davidson*.[30] Mrs. Davidson accommodated Nank as a co-maker on a $200 note to Shaffer given in return for a loan from Shaffer to Nank. Davidson and Nank also signed, as security for the note, a "chattel mortgage" on an automobile bought with the loaned money by Nank from a third party. Nank received the certificate of title to the car from the previous owner and sent it to Shaffer. Before Shaffer filed the "chattel mortgage" or properly certified the title, Nank sold the car to another party and disappeared. Presumably the last party took without knowledge of the security interest and thus bought free of it under section 9-307(2).[31] When sued by Shaffer, Mrs. Davidson asserted section 3-606(1)(b) as a defense. Shaffer countered with the argument that by Comment 5 to section 3-606,[32] by section 9-207(1)[33] referred to in Comment 5, and by the Article 9 definition of collateral,[34] acts of impairment under section 3-606(1)(b) can involve only the property covered by a mortgage, not the mortgage itself.

The court held for Mrs. Davidson on two theories. First, the court read section 9-207(1) as requiring reasonable care in filing the "chattel mortgage." Secondly, the court held that since the definition of collateral given in section 9-105(1)(c) is limited by its terms to Article 9, for purposes of Article 3, "the plain, ordinary, and usual meaning of that word is to be accepted."[35] After sur-

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[30] 445 P.2d 13 (Wyo. 1968).

[31] UCC § 9-307(2) provides that a bona fide purchaser of consumer goods takes free of an unperfected security interest in the goods if they are bought from a consumer for personal, family, or household use.

[32] UCC § 3-606, Comment 5 provides in relevant part: "As to when a holder's actions in dealing with collateral may be 'unjustifiable,' the section on rights and duties with respect to collateral in the possession of a secured party (Section 9-207) should be consulted."

[33] UCC § 9-207(1) provides in full:

> A secured party must use reasonable care in the custody and preservation of collateral in his possession. In the case of an instrument or chattel paper reasonable care includes taking necessary steps to preserve rights against prior parties unless otherwise agreed.

[34] Collateral is defined in UCC § 9-105(1)(c) as follows: "'Collateral' means the property subject to a security interest and includes accounts, contract rights and chattel paper which have been sold."

[35] 445 P.2d at 16.

veying definitions from several sources, the court concluded that the definition of the word includes security other than pledges. By not filing the "chattel mortgage," Shaffer thus "failed or neglected to do that which the code required him to do."[36] Therefore, Mrs. Davidson was discharged.

The court evidently found section 9-207(1) applicable because a "chattel mortgage" was involved and because section 9-207(1) specifically mentions "chattel paper."[37] Such a holding is without merit. The security impaired in the *Shaffer* case is known as an "Article 9 security interest." The official definition of "chattel paper"[38] cannot reasonably be read to include "security interest."[39] "Chattel paper," as used in *Shaffer*, possibly could refer only to the papers representing the security interest.[40] Furthermore, section 9-207(1) deals with the proper care of pledges. Pledged chattel paper requires the same care as pledged tangible property; but, in any case, the *Shaffer* court was not involved with a pledge of chattel paper or with a pledge of any other type of property.

The court in *Shaffer* found on an alternate theory without reference to section 9-207(1) that a security interest itself can be impaired. The court's tortured utlization of section 9-207(1), however, leaves open the question of the proper effect of section 9-207(1) upon section 3-606(1)(b). At least five answers are possible: (1) Collateral, for purposes of section 3-606(1)(b), includes only those property interests covered by section 9-207(1);[41] (2) the standard of reasonable care found in section 9-207(1) applies to section 3-606(1)(b) only when the collateral covered by section 3-606(1)(b) includes property interests covered by section 9-207(1); (3) the section 9-207(1) standard of reasonable care applies generally to section 3-606(1)(b);[42] (4) application of the section

[36] *Id.* at 17.

[37] The court emphasized the word "chattel" and italicized it in quoting section 9-207(1). *Id.* at 15.

[38] Chattel paper is defined in UCC § 9-105(1)(b) as follows:

> "Chattel paper" means a writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods. When a transaction is evidenced both by such a security agreement or a lease and by an instrument or a series of instruments, the group of writings taken together constitutes chattel paper.

[39] UCC § 1-201(37) defines "security interest" as an "interest in personal property or fixtures which secures payment or performance of an obligation."

[40] For instances of when "chattel paper" can serve as collateral, see UCC § 9-105, Comment 3.

[41] Pancoast v. Century Homes, Inc., 8 U.C.C. REP. SERV. 1289 (Okla. Ct. App. 1971); Commerce Union Bank v. May, 503 S.W.2d 112 (Tenn. 1973).

[42] First Bank & Trust Co. v. Post, 10 Ill. App. 3d 127, 293 N.E.2d 907 (1973); White v. Household Finance Corp., 302 N.E.2d 828 (Ind. Ct. App. 1973); Peoples Bank v. Pied Piper Retreat, Inc., 207 S.E.2d 184 (W. Va. 1974).

9-207(1) standard is optional with the court; or (5) section 9-207 (1) can have no effect upon section 3-606(1)(b).[43]

The only reference to a possible effect of section 9-207(1) upon section 3-606(1)(b) is that made in Comment 5 to section 3-606, and the terms of the Comment may establish the limitations on such an effect. The key word in the Comment is "unjustifiably," not "collateral." This suggests that a standard of care is sought by the reference to section 9-207(1), rather than a definition of that interest to which a standard would apply. Moreover, the last phrase of the Comment refers to section 9-207(1) as dealing with security "in the possession of the secured party," that is, with pledges. This negatively implies that section 3-606(1)(b) deals with other, or at least additional, security .

The position can still be taken that regardless of any effect of section 9-207(1) upon section 3-606(1)(b), the Article 9 definition of collateral should control what constitutes collateral for purposes of section 3-606(1)(b). One can argue that by restricting the definition of collateral for section 3-606(1)(b) to exclude any type of security interest, the drafters of Article 3 made a policy decision that principals and sureties are responsible for perfecting or otherwise protecting any security interest they give to a creditor-holder.[44] The holding of the court in *Shaffer* that

[43]Both alternatives four and five are based on the argument that the Comments cannot control the text of a UCC section. The alternatives are distinguished by the position taken toward inter-article effectiveness. If the separate articles of the UCC are held to be separate and distinct, alternative five must be upheld. The better view is that as much as possible the UCC should be read as a unit. Even though section 9-207(1) is held to be in no way controlling for section 3-606, the reasonable care standard of section 9-207(1) can be taken as an appropriate standard for section 3-606, which use would promote uniformity among the jurisdictions in determining what constitutes unjustifiable impairment of collateral. The section 9-207(1) standard can be thought of as the opinion of the majority of the drafters of the entire UCC as to what constitutes an appropriate standard of care when property interests of one person are placed in the care of another.

[44]Compare the holding in Rushton v. U.M. & M. Credit Corp., 245 Ark. 703, 434 S.W.2d 81 (1968), with the dissenting opinion in Peoples Bank v. Pied Piper Retreat, Inc., 207 S.E.2d 184 (W. Va. 1974). In *Rushton* the co-maker of a note with a corporate buyer signed as "trustee" of the corporation. The note was given to a seller who sold equipment to the corporation. The seller transferred the note to his financing institution. The "trustee" co-maker claimed discharge when the seller failed to perfect a security interest given on the note before the corporation filed a bankruptcy petition. Evidently the seller regularly discounted his sales contracts with the financing institution. The court not only found the financer a holder in due course but also refused to find the seller to be an agent of the financer, so that acts of impairment by the seller could not be imputed to the financer. The court held that, given the relationship between the co-maker and the corporate buyer, the co-maker could also have perfected the security interest. Seemingly the co-maker's

Article 3 calls for a separate definition of collateral comprises one possible response. The more basic argument is that both the history of section 3-606(1)(b) in NIL sections 119 and 120 and its roots in general suretyship law make it highly dubious that the Code drafters intended to make such a restriction and to do so without explicitly stating the limitation. In numerous cases under the NIL[45] and in general surteyship law,[46] the creditor has been held to have discharged the surety by failing to file or to protect a security interest given for the debt.

B. Specific Findings of Impairment of Collateral: Code Standards and Common Law Standards

Courts that find the standard of reasonable care under section 9-207(1), whether or not limited to pledges, statutorily mandated for section 3-606(1)(b), must still look to suretyship law, not as a source of stare decisis, but for some idea of what "reasonable care" involves. Although by its terms this reasonable care test seems to fall somewhere between the second and third categories of creditor acts of impairment listed above, that line is as difficult to draw under the UCC as it is at common law to determine into which of the categories a particular acts falls.

In *First National Bank v. Helwig*,[47] for example, the bank did not foreclose a mortgage after it came due and the property

status as principal or surety was not relevant to the court's holdings.

In *Pied Piper* the sole stockholders of a corporation signing as co-makers with the corporation on a note to the bank were not allowed even prorata discharge when the bank failed to perfect a security interest given on the note and thus lost priority to a third party lien. The court held that only accommodation parties were covered by section 3-606. The question should have been whether the collateral had been given for the benefit of the stockholder co-makers. The dissent argued, however, that even a non-accommodation party is discharged by a bank's impairment of collateral given on his behalf because the maker then has less funds with which to pay the note and because banks are the specialists in financial matters and thus should have the burden of perfecting security interests they take.

The provisions of Article 9 regarding perfection give some credence to an argument that overall Code policy places a heavier burden on secured parties. A buyer for consumer purposes takes free of an unfiled security interest of which he did not have knowledge. UCC § 9-207(2). When non-consumer goods are involved, however, a subsequent secured party takes priority over a previous secured party who does not first perfect even though the subsequent party has knowledge of the previous security interest. UCC § 9-312(5). One rationale for the different provisions is that financial institutions and businesses, which will take most of the security interests under Article 9, should have the burden of following the reasonable commercial practice of perfecting their interests.

[45]BRITTON §§ 292, 301.

[46]SIMPSON § 75; STEARNS § 6.46; WILLISTON § 1233.

[47]464 S.W. 2d 953 (Tex. Civ. App. 1971).

serving as collateral for the mortgage burned. The mortgage itself served as collateral for a note. The court found the holder bank in technical possession of the property when it burned and held the dispositive issues in the case to be whether the bank had been negligent in dealing with the property. The court obviously benefited the defendant, who made the note as surety for the principal company, by concentrating on the burning of the property rather than the bank's failure to foreclose the mortgage as constituting the impairing act. Creditor negligence towards pledged property is a special suretyship defense much more readily available under general suretyship law than is a creditor's failure to foreclose.[48] Thus, such defense is more likely to be required under a section 9-207(1) standard.

The exact standard used by the *Helwig* court is unclear. The court discussed the distinction in the Texas law of suretyship between active and passive negligence and, finding the categories indistinct, evolved a new rule that a creditor in possession of property securing a debt owes a duty of ordinary care to preserve and protect that property.[49] Immediately after announcing this rule, however, the court cited sections 3-606(1)(b) and 9-207(1) with the caveat "if applicable."[50] The UCC was promulgated in Texas in the interval between the signing of the note and a renewal of the note involved in *Helwig*. The court found no conflict between its enunciated common law rule and the duty of reasonable care found in section 9-207(1). By using "security" rather than "collateral" in paraphrasing section 3-606(1)(b), the court suggested that under the Code this standard applies to security other than property in the holder's personal possession.[51]

It is well settled that a creditor discharges a surety when he releases collateral given on the debt.[52] This defense under section 3-606(1)(b) was involved with many complications in *White v. Household Finance Corp.*[53] The Whites were accommodation co-makers on a note for $2,095.25 given to Household Finance Corporation (Household) by their minor nephew, Ricky Butzin, to finance the purchase of a 1960 Dodge Charger. The same parties signed a security agreement covering the car. The security agreement served as collateral on the note. Butzin obtained insurance

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[48]SIMPSON § 75.

[49]464 S.W.2d at 955.

[50]*Id.*

[51]*Id.*

[52]SIMPSON § 74.

[53]302 N.E.2d 828 (Ind. Ct. App. 1973). For a discussion of *White*, see Bepko, *Contracts, 1974 Survey of Indiana Law*, 8 IND. L. REV. 116, 127-29 (1974); Townsend, *Secured Transactions and Creditors' Rights, 1974 Survey of Indiana Law*, 8 IND. L. REV. 234, 239-43 (1974).

on the car with Household as the beneficiary, even though he was evidently not required to do so under the terms of the security agreement.

The nephew then had an accident which resulted in a total loss of the vehicle. Household received a check for $1,850 from the insurance company and indorsed it to a car dealer to be used by Butzin for purchasing a 1969 Plymouth. The Whites believed that the insurance proceeds had been applied to paying off the note. Title to both the Charger and the Plymouth was in the names of Butzin and the Whites, with Household listed as a lienholder.

The Indiana Court of Appeals ruled that "the indorsement of the insurance check by Household Finance Corporation and the purchase of a second automobile was not a substitution of collateral but constituted an impairment of the collateral."[54] Releasing the insurance proceeds constituted impairment under the Indiana common law rule that "[w]hen a creditor releases or negligently fails to protect security put in his possession by the principal debtor, the surety is released to the extent of the value of the security impaired."[55] The court firmly grounded its finding of impairment upon the principle of general suretyship law that a surety is "entitled to a right of subrogation to any rights in the collateral that the creditor obtains from the principal debtor."[56]

The insurance proceeds were collateral even though the insurance was obtained after the note was signed and was additional collateral for the note. Household did not impair the Whites' recourse against the Dodge, the initial collateral for the note. The original security agreement remained intact. Had there been no insurance, the Whites would have been responsible as sureties for the full amount of the note. Because of the fortuitous destruction of the Dodge, however, by releasing the insurance proceeds, Household failed to preserve for the Whites sufficient subrogation rights to protect them from loss.

Substitution of collateral in this case could have occurred in two ways. If the insurance proceeds were proceeds under the Article 9 security agreement, a security interest would have attached to the Plymouth.[57] Since the Plymouth would have replaced

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[54]302 N.E.2d at 830.

[55]*Id.* at 832.

[56]*Id.* at 834.

[57]The court held that the insurance proceeds did not constitute proceeds under the security agreement because the latter did not include a loss payable clause. *Id.* at 836. The discussion of whether insurance proceeds constitute proceeds under an Article 9 security agreement is currently a debated issue. The debate centers around the construction of section 9-306(2). Revised Article 9 provides that insurance proceeds constitute proceeds under the security agreement. UCC § 9-306(1) and Comment 1 (1972 version). A

the Dodge as the secured property, a substitution of collateral under the security agreement would have been made. Substitution of collateral would also have resulted if a new security agreement on the Plymouth had been obtained by Household.[58] The new security interest in the Plymouth would have been a substitution for the released proceeds of collateral given for the note.[59]

The court of appeals in *White* suggested that Household's failure to obtain a new security interest in the Plymouth, since no other security interest attached to the car, was itself an impair-

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good analysis of the problem is found in R. HENSON, HANDBOOK ON SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE § 6-8 (1973).

[58]The court held that Butzin's application for a title certificate on the Plymouth did not constitute a new security agreement. The court reasoned that the certificate of title could not substitute for a security agreement because it did not contain words of grant from the debtor to the putative secured party. 302 N.E.2d at 836-37.

[59]One interesting problem that could arise regarding release of collateral under section 3-606(1)(b) is the status of the so called "floating lien" given as collateral under a security agreement itself given as collateral for a note. A "floating lien" arises when a secured party contracts under section 9-204 for a security agreement to attach to the debtor's after-acquired inventory. Since buyers of the inventory in ordinary course would take free of the security interest under section 9-307(1), the security interest would "float" above the changing body of the debtor's inventory, attaching to the inventory while in the debtor's hand and to all proceeds from the sale of the inventory. These arrangements have been attacked by bankruptcy trustees as voidable preferences under section 60 of the Bankruptcy Act, 11 U.S.C. § 96 (1970), as to new property covered within four months of bankruptcy. Appellate courts have sustained the validity of these transfers. The most instructive of the cases in this area is Grain Merchants of Indiana, Inc. v. Union Bank & Savings Co., 408 F.2d 209 (7th Cir. 1969).

The relationship of "floating liens" to section 3-606 can be investigated by a hypothetical set of facts, since no cases on this point have arisen. Assume a perfected valid "floating lien." Suppose that a holder-creditor allowed his debtor's inventory to deplete so that at the date of maturity of the note, the collateral was worth less than when the security interest was originally given, and suppose further that the present value of the collateral is insufficient to cover the note. Could a surety of the debtor who is a party to the note claim impairment? This problem has not come up under the "floating lien" cases in bankruptcy. *Grain Merchant* and similar cases may well have been decided differently if, within four months of bankruptcy, the inventory had fallen and future acquired inventory was used to increase the depreciated value of the security interest. In a case under section 3-606(1)(b), a creditor-holder could be found to have released the collateral if he failed to exercise surveillance over the inventory. Conversely, the holder's duties as to the collateral may be considered controlled by the security agreement. If the agreement allows the inventory to dip, the surety is merely suffering from the limitations on collateral given by another, as the surety is initially benefited by the giving of the collateral. That is, any loss is caused by the terms imposed by the giver of the collateral and not by the misdeeds of the holder.

ment of collateral under section 3-606(1)(b).[60] As stated, this is erroneous. Creating a security interest under Article 9 involves a consensual act of at least two parties.[61] Absent agreement otherwise, a creditor's duty canot depend upon the free choice of another. If the court meant only that by failing to obtain a security interest in the Plymouth, Household had not substituted collateral for the note and thus had not cured any previous acts of impairment, it would only have stated the principle of suretyship law which supports the decision in the case.[62]

White can thus be cited for the general proposition that the provisions of general suretyship law should be incorporated into section 3-606(1)(b). These provisions specifically include the following: impairment of collateral discharges a surety pro tanto unless sufficient collateral remains to cover the debt;[63] substitution

[60]302 N.E.2d at 835.

[61]UCC §§ 9-204(1), 1-201(3).

[62]SIMPSON § 74; STEARNS § 6.46. In finding this affirmative duty, the *White* court was probably trying to answer the holding of Hunter v. Community Loan & Inv. Corp., 127 Ga. App. 142, 193 S.E.2d 55 (1972). In that case a father co-signed with his daughter a note given towards the purchase of a car. The car was "pledged" as collateral for the note. When the car burned, the insurance company, with the loan company's permission, substituted a new car. The father was sued on the note. He asserted section 3-606(1)(b), but no impairment was found because his risk had not been increased by the substitution.

The court thus read into section 3-606(1)(b) a test of increased risk to the surety for determining what constitutes impairment of collateral. The facts given in *Hunter* are sketchy but, under at least one previous Georgia case, the pledged property, to become security, would not have been required to be actually deposited at the time of making the note. Vaughn v. Farmers' & Merchants' Bank, 146 Ga. 51, 90 S.E. 478 (1916). A substitution of pledged collateral, like that of any security, discharges a surety pro tanto. If there had been no decrease in value by substituting the second car, there could have been no discharge.

The *Hunter* decision suggests a new twist to the section 9-207(1) controversy. Instead of limiting the definition of collateral in section 3-606(1)(b) to include one type of security (pledges) available under Article 9, the court seemingly extended the definition of collateral for purposes of section 3-606(1)(b) to include security interests which cannot be created under the Code. Under section 9-203, the type of equitable pledge found in *Hunter* is not a validly created security interest. UCC § 9-203 and Comment 5. Reading into section 3-606(1)(b) a non-Code standard for "unjustifiably impairs" is arguably permissible, since the only reference in section 3-606(1)(b) to section 9-207(1) is found in the non-legislatively enacted official Comments. What constitutes security for purposes of Article 3 should not, however, conflict with permissible security interests created by Article 9. Finding non-Code security interests in transactions obviously included within the coverage of Article 9 circumvents the law.

[63]The pro tanto discharge comes directly from the text of section 3-606(1) and has given courts no difficulty. The same rule exists in the general law of suretyship. SIMPSON § 74; STEARNS § 6.46. The burden is on the party

of collateral for the note or for the security agreement given for the note cures previous impairment pro tanto if the substitution is made before the principal defaults on the note;[64] security given without the surety's knowledge and even after the note itself is given is capable of being impaired;[65] and the rationale for holding the creditor liable in impairment cases is always the consequent loss of a surety's subrogation rights.[66]

White leaves in doubt the method which Indiana courts will use to determine what constitutes an unjustifiable impairment of collateral under section 3-606(1)(b). The court states in a footnote[67] that a failure to perfect or record a security interest would be impairment. As further mentioned in the footnote, this would be a change from the Indiana general law of suretyship. Such a finding points to an independent Code standard as determinative. The court may not have meant, however, the technical definition of perfection, for the discussion to which the footnote pertains deals with the *attachment* of a security interest. In any event, discussions dealing with failure to perfect as constituting impairment would be dictum in *White,* since the case dealt with release of collateral.

The court evidently held that the section 9-207(1) standard of reasonable care is applicable to section 3-606(1)(b),[68] and found that the common law rule regarding release of collateral as constituting impairment is required by this standard. In a footnote to this argument, however, the court read section 1-103 as stating that the "common law is not displaced by the Uniform Commercial Code unless the Code expressly states that the common law rule is inapplicable."[69] This is an improper construction of section 1-103. A Code provision could cover the field with a new rule without expressly overruling inconsistent common law decisions. The status of common law rules of suretyship under section 3-606(1)(b) is thus left unresolved.

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seeking discharge under section 3-606(1)(b) to establish the value of the collateral impaired. Hurst v. Citizens Trust Co., 128 Ga. App. 224, 196 S.E.2d 394 (1973); Christensen v. McAtee, 473 P.2d 659 (Ore. 1970).

[64]SIMPSON § 74; STEARNS § 6.46.

[65]SIMPSON § 74; STEARNS § 6.46; WILLISTON § 1258.

[66]SIMPSON § 74; STEARNS § 6.46.

[67]302 N.E.2d at 835 n.8.

[68]*Id.* at 834, 835 n.8.

[69]*Id.* at 834 n.7.

III. More Difficult Problems Under Section 3-606(1)(b): Recourse Dehors the Instrument and More Burdensome Affirmative Duties of Holders

A. Duties of Holders Arising Before the Instrument Comes Due

Problems arising under section 3-606(1)(b) not previously discussed are well surveyed in the recent Tennessee Supreme Court case of *Commerce Union Bank v. May.*[70] The Mays signed a note to the bank secured by a deed of trust upon land containing a hotel. The trust deed contained a provision requiring May to obtain fire insurance on the hotel with the bank as loss payee. The note had another provision absolving the bank from taking any affirmative action to preserve the collateral unless it was requested in writing to take such action and unless it was reimbursed for expenses. The Shelbys bought the property from the Mays and assumed the mortgage. A few days later the Kyles bought the property from the Shelbys, assumed the first mortgage, and gave the Shelbys a second mortgage on the same property. The bank was notified of these transactions. Kyle was later notified by the insurance company that the policy would soon lapse. There was no evidence that any other party was so informed, although the bank had in its possession a copy of the insurance policy.

Kyle failed to renew the policy on the hotel, which was destroyed by fire while not covered by insurance. Kyle later defaulted on his second mortgage, and the Shelbys repurchased the property at the foreclosure sale. The Shelbys then defaulted on the first mortgage. The bank foreclosed and sued both the Shelbys and May for a deficiency. The trial court found an affirmative duty of the bank either to have notified May of the insurance policy lapse or to have maintained the insurance at May's expense.

The Tennessee Supreme Court held that if a maker is not in the "position of a known surety" when he signs the instrument, he cannot change his status from principal to surety by transferring the property to a third party who assumes the mortgage.[71] The court argued that this rule was well established under the NIL and, in effect, the court placed a burden of proof on the UCC to overcome the presumptive validity of the rule. The court found that the NIL distinction between primary and secondary parties is retained in the UCC. Under the Code, as under the NIL, the maker is bound in the capacity in which he signs the instrument. Being primarily liable, a maker cannot change his status from principal to surety vis-à-vis the holder.

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[70] 503 S.W.2d 112 (Tenn. 1973).

[71] *Id.* at 116.

The argument in *May* is unpersuasive. The court stated at one point in the opinion that Article 3 represents a complete revision of the NIL.[72] If such is the case, using the law built up around this prior statute to construe the UCC seems a dubious procedure. The language of section 3-606(1)(b) and the Comments to it do not limit the section to accommodation parties or secondary parties.[73] In one sense, the court confused the actual knowledge requirement with notice on the instrument. Section 3-606 requires neither that a holder know of a party's right of recourse,[74] nor that such a right even exist,[75] before the instrument is taken. Sufficient safeguards for the holder are established by requiring him to have actual knowledge of the suretyship relationship before acting in a way that impairs collateral.[76]

Although the case had already been decided against May on the threshold issue of the applicability of section 3-606(1)(b), the court continued to find no act of impairment by the bank. Citing section 132 of the *Restatement of Security* and several recent cases in suretyship law,[77] it was found that on the facts of this case no affirmative duty toward the collateral had been established for the bank. Since no duty rested upon the bank, nonperformance by

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[72] *Id.*

[73] See text associated with notes 5-10 *supra*.

[74] See notes 15-16 *supra*.

[75] This is the rule in the general law of suretyship. G. OSBORNE, HANDBOOK ON THE LAW OF MORTGAGES §§ 269, 270 (2d ed. 1970) [hereinafter cited as OSBORNE]; STEARNS § 2.3; WILLISTON § 1258. This was also the common law rule for negotiable instruments. WILLISTON § 1259. A probable majority of courts under the NIL did not allow a party primarily liable on an instrument to change his status vis-à-vis the holder from principal to surety. OSBORNE § 271; WILLISTON § 1259.

[76] In Mortgage Guarantee Co. v. Chotiner, 8 Cal. 2d 110, 64 P.2d 138 (1936), a case decided under the NIL, the court argued for the minority rule as follows:

> Aside from the criticism that the statute itself does not compel the overruling of the existing suretyship law, the most cogent objection to the majority rule is that the rights of the surety do not depend upon the face of the paper but on outside equities, and a recognition thereof would not actually obstruct negotiability or impair circulation, since the rule only applies where the holder has knowledge of the principal and surety relation between the obligors and has acted in disregard of the equities arising from the contract of suretyship.

Id. at 121, 64 P.2d at 144. Authorities supporting this position are listed by the *Chotiner* court. *Id.* The same reasoning applies under section 3-606 of the UCC.

[77] The court cited United States v. Fyles, 253 F. Supp. 386 (D. Vt. 1965); Evans v. American Bank & Trust Co., 116 Ga. App. 468, 157 S.E.2d 816 (1967); Woodruff Motors, Inc. v. Commercial Credit Corp., 123 Vt. 404, 190 A.2d 705 (1963).

the bank of any acts that would have preserved the collateral could not constitute impairment. The standard used by the court in determining whether or not an affirmative duty rested on the holder is well stated in a comment to section 132 of the *Restatement of Security:* "The nature of the security may impose upon the creditor duties to preserve its value so long as the creditor is the only person who can conveniently take the appropriate action."[78] In spite of the greater business experience of the bank and the fact that it had a copy of the insurance policy, the court would not raise this standard. The bank was not notified of the imminent cancellation of the insurance, and May had equal opportunity with the bank to check up on the policy. A party with recourse also has responsibilities toward the collateral.

Exactly when these affirmative creditor duties arise cannot be determined only by a comparison of the cases dealing with the issue. Such a finding must necessarily involve the court's discretion based on the equities of a given set of facts, a process reflecting the equitable foundation of suretyship law. Section 132 of the *Restatement of Security* is no more than a guide, as are the cases under it. Incorporated into the Code, both section 132 of the *Restatement of Security* and the cases pertaining to it may be found to be an elaboration upon the section 9-207(1) test of reasonable care, or both may be considered a separate standard directly under section 3-606(1)(b). Whichever, equitable considerations will similarly remain paramount under the UCC as they are in general suretyship law when these outer limits of a holder's accountability are reached.[79]

Even if the court in *May* had found that the bank breached an affirmative duty toward the collateral, May would not have been discharged because he gave consent to the bank's nonperformance of managerial tasks when the bank was unsolicited to do them. Courts have read consent provisions broadly, and no serious issues concerning them have arisen to date. Section 3-606 does not require that the consent be given on the instrument. Many accommodation parties sign some type of security agreement given as collateral for the instrument. By section 3-119, they are bound as against any holder to any consent stated in such agreements.[80] Separate

[78]RESTATEMENT OF SECURITY § 132, Comment *c* (1941).

[79]Similar problems regarding affirmative holder's duties appear in Liberty Nat'l Bank & Trust Co. v. Interstate Motel Developers, Inc., 346 F. Supp. 888 (S.D. Ga. 1972); Pancoast v. Century Homes, Inc., 8 U.C.C. REP. SERV. 1289 (Okla. Ct. App. 1971).

[80]UCC § 3-119 provides in full:

> (1) As between the obligor and his immediate obligee or any transferee the terms of an instrument may be modified or affected by any other written agreement executed as part of the same trans-

oral or written consent to a holder should also suffice to bind the party giving it.[81] In many cases the holder's knowledge of rights of recourse comes from information not appearing on the instrument. If rights can arise dehors the face of the instrument, they can be limited dehors the instrument.

Another possible means of establishing impairment of collateral, one not discussed in *May*, arises when a creditor specifically assumes duties regarding the collateral given for a security agreement. These duties are in a sense additional collateral. Any failure in discharging them can be viewed as an impairment of collateral. For impairment to result, the surety need not be a party to the agreement creating the duty, just as a surety need not know of or solicit collateral given on the debt.[82] The same reasoning applies when negotiable instruments are involved.[83] Section 3-119, however, controls which holders would be liable on written agreements accompanying negotiable instruments, since the creation of a duty when it would not otherwise exist seems obviously a limitation on the holder's rights.[84] Comment 2 to section 3-119 should not be read in this context to deny parties on the instrument in a suretyship position discharge against a nonperforming holder. These promises constitute additional security on the note and, thus, are beneficial to parties with recourse.

B. Duties Arising After the Instrument Comes Due

Determining what constitutes impairment of collateral after default requires dealing with a complication in a negotiable instruments context not found in general suretyship law.[85] Under

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action, except that a holder in due course is not affected by any limitation of his rights arising out of the separate written agreement if he had no notice of the limitation when he took the instrument.

(2) A separate agreement does not affect the negotiability of the instrument.

UCC § 3-119, Comment 2 provides in full:

Other parties, such as accommodation indorsers, are not affected by the separate writing unless they were also parties to it as part of the transaction by which they became bound on the instrument.

[81]UCC § 3-606(1) and Comment 2.

[82]SIMPSON §§ 74, 75; STEARNS § 6.46. When the act is optional with the holder, as in *May*, it would seem inequitable to find the holder liable for nonperformance unless the act also constituted an affirmative holder's duty independent of any agreement. If the act is optional with the holder and he begins performance, some type of estoppel argument may be appropriate, at least if the surety knew of the beginning of performance.

[83]UCC § 3-119 and Comment 3.

[84]UCC § 3-119 and Comment 4.

[85]Another complication with suretyship on negotiable instruments is the extent to which the time when a holder takes an instrument determines the rights of a surety-party and holder vis-à-vis each other. As to the time of

general suretyship law, after a debt comes due, a surety cannot claim impairment because of a creditor's failure to collect the proceeds of the collateral.[86] It is held that the surety can pay the debt and obtain subrogation rights in the collateral. Should the creditor both fail to collect on or otherwise preserve the collateral in a situation threatening release of the collateral and refuse to sue the principal or surety, the surety can tender payment and is discharged if the creditor rejects the tender.[87]

This relief may not be available under section 3-606(1)(b). Section 3-604(1) limits a party's remedy upon a holder's rejection of his tender after the note is due to discharge from any liability for late payment. Incorporating into section 3-606(1)(b) the general suretyship principle of discharge pro tanto upon rejection of tender thus demands a much broader reading of the section than when general suretyship law is used only to define the open-ended terms of the section. This is supplementing section 3-606(1)(b) via section 1-103 on an issue explicitly dealt with by section 3-604(1). A strong argument is thus made for the application of section 132 of the *Restatement of Security* and Comment C to section 132 in such situations.

C. Cosuretyship Under Section 3-606(1)(b)

General suretyship law also supplements section 3-606(1)(b) when cosuretyship issues are present.[88] The few cases in suretyship

initial creation of these rights, see Peters, *supra* note 17, at 844-48. Professor Peters bases her arguments upon section 3-415(2). As to the time limits on accrual of a cause of action, any rights of a holder against the surety-party must have accrued before maturity of the instrument. A holder taking after maturity could not be in due course under section 3-302(1)(c), and any discharge by a previous holder could thus be asserted against the present holder under section 3-602 regardless of notice or knowledge of the discharge by the present holder. See note 15 *supra*. Any post maturity discharge by the present holder would depend upon the application of section 3-606(1)(b). *See* Tennessee Farmers Mut. Ins. Co. v. Scott, 8 U.C.C. REP. SERV. 399 (Tenn. 1970).

[86]SIMPSON § 43; STEARNS §§ 6.35, 6.36.

[87]SIMPSON § 77; STEARNS § 6.35; WILLISTON §§ 1235, 1266, 1276. By statute or judicial rule a jurisdiction may apply the doctrine of Pain v. Packard, 13 Johns. 174 (N.Y. Sup. Ct. 1816), which releases the surety if the principal refuses the surety's request to sue the principal. Actual loss may be required before the doctrine is applied. If a statute is involved, it will often be construed narrowly. *See generally* SIMPSON § 42, at 178; STEARNS § 6.38; WILLISTON § 1276. If suing the principal will not secure the creditor's rights in the security and if the principal is not fully collectible, the doctrine of Pain v. Packard, *supra*, will not protect a surety whose creditor will not go against the collateral. WILLISTON § 1276, at 3642 n.4. The surety also has a right known as exoneration to force his principal to pay the creditor. SIMPSON § 46; STEARNS § 6.1.

[88]"All persons who are bound for the same debt of a principal are

law on point conflict as to whether one cosurety has an interest in collateral given by another cosurety[89] and, thus, by logical extension whether a creditor's impairment of the collateral given by one cosurety discharges the other cosureties. Section 135 of the *Restatement of Security* discharges the cosureties proportionately in limited situations.[90] This should be the result generally under the UCC. Any cosurety party to the instrument would be discharged because the collateral had been given on behalf of the principal, one against whom the party had recourse. However, by the equitable doctrine of contribution supplementing section 3-606(1)(b), the discharged party would have to share the benefits of the discharge with his fellow cosureties.[91]

In *Brunner v. Smith*,[92] interesting cosuretyship problems were present in the facts but were not discussed in the opinion and evidently were not raised by the parties. Smith and Brunner were cosureties because they were both secondarily liable on the same debt—Smith by his pledge and Brunner by his contract as accommodation maker of the note.[93] It makes no difference to the creation of the cosuretyship that Smith was not a party to the note. The supplemental principles of suretyship law establish the mutual rights and duties of the parties. Either Smith or Brunner could thus have claimed a contribution from the other of any benefits

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cosureties." SIMPSON § 10. *See generally* SIMPSON §§ 10, 49; WILLISTON §§ 1261, 1263, 1277A, 1278-82.

This Note does not discuss subsuretyship because of the complications which could result in setting up models of successive liability, since under section 3-606 subsuretyship, as cosuretyship, could arise on or dehors the instrument. Generally, successive indorsers are subsureties. UCC § 3-414(2). Subsuretyship can be thought of as establishing a series of creditor-surety-principal obligations seriatim, with the usual rules applicable to each grouping in turn. *See generally* SIMPSON §§ 12, 13; WILLISTON §§ 1262, 1282.

[89]*Compare* Marshall & Ilsley Bank v. Morrey, 205 Mich. 513, 171 N.W. 533 (1919), *with* Sanderson v. Cicero State Bank, 125 N.J. Eq. 450, 6 A.2d 130 (1939). Professor Williston finds the rule settled that a cosurety receives the benefits of impairment of collateral only if the collateral is given by the principal. WILLISTON § 1281.

[90]The *Restatement* would discharge the second cosurety when the first cosurety is bound to his suretyship only by the giving of collateral. The first cosurety has made no promise of suretyship. It is reasoned that impairment of the collateral given by the first cosurety completely releases him from his obligation as surety and that such conduct by the holder is inequitable towards the second cosurety. *See* RESTATEMENT OF SECURITY § 135 and Comment *c* (1941).

[91]RESTATEMENT OF RESTITUTION § 81 and Comment *c* (1937); RESTATEMENT OF SECURITY § 154 (1941); SIMPSON § 49.

[92]467 S.W.2d 565 (Tex. Civ. App. 1971). See text accompanying notes 20-26 *supra*.

[93]RESTATEMENT OF SECURITY § 135 (1941) thus applies to the facts of *Brunner*. See note 90 *supra*.

which resulted from the holder's impairment of the pledged stock. Likewise, if one of them had paid more than half of the note, he could have demanded contribution from the other.

The application of these cosuretyship principles was complicated when Smith became a holder.[94] The rights of a holder against a party to the instrument are determined by the rules of Article 3. Arguably, Brunner would have been required to bring himself specifically within section 3-606(1)(b) to have obtained any relief. The only act of the bank possibly constituting impairment was its sale of the note and assignment of the collateral to Smith. If Smith's status as creditor-holder and surety then merged,[95] terminating the latter, Brunner lost his contribution rights in the collateral. On the one hand, had Brunner been able to establish against Smith his discharge by the bank, Smith would not have been able to seek contribution. On the other hand, had no discharge of Brunner been found or allowed, Brunner would have been the one accountable for the full amount of the note, assuming that his principal, Steele, did not pay it.

Situations such as those present but not adjudicated in *Brunner* may arise relatively frequently under the UCC because of the broadened availability of the impairment defense. One in a cosuretyship position, on or off the instrument, will pay the instrument, have it properly negotiated to him, and claim immunity from any obligation of contribution while demanding payment in full from the other sureties. In rendering a decision in such cases, courts should seek an equitable solution. This could involve a two step process of applying the Article 3 provisions as to the rights of a holder, but adjusting these rights through general suretyship law.[96] Since the cosuretyship relationship arises outside of Article 3, such adjustments would not involve tampering with the Code.

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[94]How Brunner would have to establish impairment by either Smith or the bank after Smith became a holder was previously discussed in a context absent cosuretyship issues. See text associated with notes 24-26 *supra*.

[95]The Code rule may predominate for two reasons. When the same person holds both a legal and an equitable right in the same thing and the rights are coextensive, the equitable right may be considered merged into the legal right, although the rule is generally associated with the law of real property. Also, UCC Article 3 may be held controlling in all matters touching negotiable instruments.

[96]This does not require that the full equitable right of contribution be applied in every case. Rights of contribution may be modified by the equities of the given facts. Important considerations may be the dependence of the non-holder cosurety upon the presence of the other surety as a reason for initially making his suretyship contract, the extent to which the holder-cosurety induced this reliance, and the knowledge of the holder-cosurety of the other cosurety's suretyship status.

IV. Conclusion

The difficulties some courts have had with the threshold issues of section 3-606 could have been resolved by a careful reading and analysis of the text of the section. Courts should especially avoid reading into section 3-606 the terms of the revoked NIL and cases pertaining to it. Section 3-606 contains on its face the tests for determining when it applies and which parties come within it. The actual knowledge standard of section 3-606(1)(a) should be found applicable to section 3-606(1)(b). Furthermore, the actual knowledge standard should be used whenever any party to the instrument asserts one of the special suretyship defenses. This results in evenhanded treatment for each of these defenses and for accommodation parties vis-à-vis other parties to the instrument in a suretyship position. Notice on the instrument of a party's suretyship status may be evidence of the holder's knowledge in fact of such status, but this notice remains a matter of fact, not of law, under section 3-606.

Courts should use the section 9-207(1) standard of reasonable care supplemented by the equitable principles of general suretyship law to determine what constitutes unjustifiable impairment of collateral. Establishing a Code standard for the impairment defense will build up a uniform national body of law around section 3-606(1)(b), thus furthering the Code's purpose "to make uniform the law among the various jurisdictions."[97] Collateral should be defined for purposes of Article 3 to include security interests as well as the collateral given for a security interest. In matters of cosuretyship, the general provisions of suretyship law should be applied if necessary to modify any inequitable results attained from an initial application of Article 3 provisions. Such results will not conflict with negotiable instrument law but, rather, will show that some parties are subject to additional limitations on their rights.

Overall, section 3-606(1)(b), indeed the entire section 3-606, does not contain difficult provisions. The section constitutes no more than a small exercise in statutory construction for the courts dealing with it. The serious problems involved in interpreting a code as relatively new as the UCC often lie not in failing to determine the exact meaning intended by the drafters, but in obscuring the issues obviously present. If a court clearly analyzes the issues involved in a given Code section, the next court can more easily correct any faulty conclusions. Reasoned debate on the meaning of that section is then possible. For similar reasons, close analysis by the legal profession of these early cases under the Code thwarts

[97] UCC § 1-102(2)(c).

the development of aberrant lines of authority before they become too well established to challenge.

NATHANIEL RUFF

Client Confidentiality and Securities Practice: A Demurrer From the Current Controversy

I. The Issue

The American legal system is conceived as essentially an adversary process; justice, hopefully, is achieved by having competing views presented with vigor. Our courts refuse to respond to questions that are not "justiciable," that is, which present no true "case or controversy" under the Constitutional mandate.[1] It has long been the position of the bench that only when the parties have a personal stake in the outcome will the arguments be zealously presented and the issues drawn with the clarity necessary to fair and thoughtful resolution.[2]

The Code of Professional Responsibility is grounded in this adversary philosophy. Canon Seven emphasizes the duty to "represent a client zealously within the bounds of the law."[3] Canon Five prohibits conflicts of interest on the premise that one cannot adequately serve two masters.[4] Canon Four, which deals with the preservation of a client's confidential communications, grows out of our expectation that the lawyer must encourage full disclosure by his client in order that he may further that client's goals more successfully.[5]

In the popular media, the lawyer is seldom pictured drafting a will, or a real estate contract or a prospectus. The preoccupation is with litigation, with the adversary role.

It is frequently argued that such preoccupation is in conflict with the nature of the work many lawyers do and that by focusing upon the lawyer-as-advocate we fail to appreciate the duty the attorney owes to regulatory agencies and the public. Nowhere is this argument being advanced with more force than in the securities field. The securities lawyer may never go into a courtroom; the bulk of his work involves counselling corporate clients, preparing documents, submitting reports and opinions, and generally interpreting the highly complex and specialized regulations of the Securities Exchange Commission. Furthermore, a public offering affects investors who depend upon information in the prospectus—a prospectus which reflects the advice and counsel of the securities practitioner. It is undisupted that such practitioner

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[1] U.S. Const. art. III.

[2] Poe v. Ullman, 367 U.S. 497 (1961); Muskrat v. United States, 219 U.S. 346 (1911).

[3] ABA Code of Professional Responsibility, Canon Seven (1970).

[4] *Id.*, Canon Five.

[5] *Id.*, Canon Four.

owes a duty to the investing public, but the parameters of that duty are unclear.

What is the lawyer to do when his duty to his client conflicts with his duty to the public? When the client is attempting a patent fraud, or is involved in some other obviously illegal activity, the ethical problem is not severe; the Code clearly prohibits the lawyer from participation in illegal activities and just as clearly permits him to report the client to the appropriate authorities.[6] But instances of intentional lawbreaking are relatively rare; as any practitioner knows, it is far more common for a client to request assistance in reaching a goal with whatever leeway the law allows, leaving to the lawyer the task of determining just what the leeway is. In the securities field, where the law is developing rapidly, and where liability for non-disclosure is expanding, it is not a simple matter to determine what the law allows. The philosophy behind attorney-client confidentiality is sound. A lawyer cannot be effective unless he has access to all relevant information. The client must be encouraged to divulge those aspects of his situation that are disadvantageous as well as those which are favorable. Otherwise, the lawyer, and the client, are due for some unpleasant surprises. At the same time, the principle of disclosure is fundamental to all securities legislation. The issuer of stock is a seller in a market where *caveat emptor* is peculiarly inappropriate. The buyer, or investor, is rarely able to verify the claims made on behalf of the company issuing the securities; he must rely upon the SEC, and the legal profession, to enforce a full and honest disclosure of the condition and prospects of the issuer .

Other factors further complicate the issue. Legal debate still rages over when the attorney-client privilege attaches.[7] When the client is a corporation, different courts apply substantially different tests to determine which natural persons within the corporation are the client for purposes of the privileges.[8] Furthermore,

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[6] *Id.*, Disciplinary Rule No. 4-101.

[7] For an extended discussion of this problem, see McCormick's Handbook of the Law of Evidence § 175 (2d ed. E. Cleary 1972). For the purposes of this Note, no distinction has been drawn between the attorney-client privilege and the ethical mandate which requires that a lawyer keep his client's communication confidential. The privilege is, of course, evidentiary. See discussion at note 8 *infra*.

[8] The attorney-client privilege applies to corporations if the usual requisites for the privilege are present. In order to be privileged, a communication must be between the client and the attorney and must have been intended to be confidential. The problem arises when it is necessary to determine just which natural persons within the corporate structure comprise the client, in order to ensure that the privilege attaches and is not waived.

Courts are split over the proper test to be used. The narrowest is the so-called "control group" test. The leading case using that test is Philadelphia

the Canons are by no means clear about when a lawyer may ethically disregard the privilege.

What does the lawyer do, for example, when he receives presumably privileged information from one client which concerns another client? It is hornbook law that the privilege belongs to the *client,* and that only the client can waive it,[9] but a brief hypothetical will indicate the nature of the dilemma. Suppose client A comes to lawyer B, who works for a large law firm. Client A wants to sue XYZ Corporation for a substantial amount and seems to have a good case. Lawyer B, after their initial, detailed consultation, discovers that his firm does some legal work for XYZ. He immediately informs client A and refers him to another firm because of the conflict of interest. Three weeks later, before any complaint has been filed, the firm receives a routine request for an audit letter from XYZ, before XYZ is itself aware of the impending suit. The letter asks the firm to certify that

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v. Westinghouse Elec. Corp., 210 F. Supp. 483 (E.D. Pa. 1962). However, in D.I. Chadbourne, Inc. v. Superior Court, 60 Cal. 2d 723, 388 P.2d 700, 36 Cal. Rptr. 468 (1964), an employee was said to be within the privilege if he was the natural person to speak for the corporation. In United Stattes v. United Shoe Mach. Corp., 89 F. Supp. 357 (D. Mass. 1950), and Zenith Radio Corp. v. Radio Corp. of America, 121 F. Supp. 792 (D. Del. 1954), the courts included within the privilege any information secured from an officer or employee which was not disclosed in a public document or before third persons, but did not define "public document" in this context.

> The Seventh Circuit has extended the client privilege to any employee sufficiently identified with the corporation so that his communication to the corporation's counsel is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communciation is the performance by the employee of the duties of his employment.

Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 491 (7th Cir. 1970).

Despite a good deal of similar case law extending the privilege beyond the control group, it is likely that the restrictive test will ultimately prevail. There are two reasons: (1) as a practical matter, the test is easier to apply, and (2) the weight of authority has restricted the use of the client privilege in the past, while recent case law has emphasized this restriction. A good brief summary of the status of the corporate attorney-client privilege can be found in Note, *The Attorney-Client Privilege in the Corporate Setting: A Suggested Approach,* 69 MICH. L. REV. 360 (1970). The author notes five elements essential to the privilege: (1) legal advice was sought, (2) from a lawyer in his capacity as such, (3) the communication related to the situation for which advice was being sought, (4) the communication was intended to be confidential, and (5) the employee is within the definition of "corporate client." See also Note, *Testimonial Privilege and Competency in Indiana,* 27 IND. L.J. 256 (1951); Annot., 98 A.L.R.2d 245 (1964).

[9]MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 92 (2d ed. E. Cleary 1972).

it knows of "no contingent liabilities that would materially affect the value of XYZ stock." The suit, if successful, *might* have such an effect. What is the firm's duty? Even if the information had come from XYZ itself, there is considerable debate over whether such a broadly phrased request for an audit letter constitutes a waiver of the privilege.[10] Even if it does, it is unlikely that most firms making such requests are aware of this fact. Is it ethical

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[10]Despite the frequency with which it is said that waiver can never be inadvertent or accidental but must be "knowing" and "voluntary," courts are notorious for finding waiver when the information desired is crucial and otherwise unobtainable. Note, *Testimonial Privilege and Competency in Indiana*, 27 IND. L.J. 256 (1951).

It has been said that waiver has two elements: (1) an intent to waive, which is subjective and (2) an assertion of the privilege "inconsistent" with the claim or defense being raised. Hyde Constr. Co. v. Koehring, 455 F.2d 337 (5th Cir. 1972). In practice, courts seem quite willing to infer the subjective element from the existence of the objective one. "Doing of an act inconsistent with the claim of privilege is a waiver." Newkirk v. Rothrock, 293 N.E.2d 550, 554 (Ind. Ct. App. 1973). An arrangement between insurers of two vehicles involved in a collision to exchange statements of their insureds waived any privilege that might otherwise have been invoked. Halloran v. Tousignant, 230 Minn. 399, 41 N.W.2d 874 (1950). Public discussion of the communication waives the privilege. Seeger v. Odell, 64 Cal. App. 2d 397, 148 P.2d 901 (1944).

The inclusion of a third party in a discussion otherwise privileged has generated much case law. It is generally held that the function of the third party is the determinative factor, and that if the third person's presence was reasonably necessary, confidentiality will not be considered waived. United States v. Kovel, 296 F.2d 918 (2d Cir. 1961). *See* Annot., 96 A.L.R.2d 125 (1964). The client was found to have lost his right to insist upon the privilege in a situation in which a charge of fraud implicated the corporation's legal counsel. In such situations, the law firm could use the confidential information to defend its own actions in the matter. Marco v. Dulles, 169 F. Supp. 622 (S.D.N.Y. 1959).

When a corporation is the client, a determination of whether or not a particular communication was kept confidential will depend partly upon which test the court uses to decide which individuals comprise the client. If the control group test is used, note 8 *supra*, it is easier to ascertain whether or not the requisite confidentality was maintained.

> When a firm does not keep a communication confidential—thereby demonstrating that it will tolerate disclosure—the privilege should be denied since its promise of secrecy was plainly not a factor in the decision to give counsel the information. . . .

Note, *The Attorney-Client Privilege for Corporate Clients: The Control Group Test*, 84 HARV. L. REV. 424, 428 (1970).

It is a matter of some practical difficulty to determine just when a corporation has "disclosed" information for the purposes of the waiver doctrine. Courts seem to indulge a presumption that corporate papers and records are not confidential unless clearly designated as such. In United States v. Silverman, 430 F.2d 106 (2d Cir. 1970), the Second Circuit, without elaboration or citation, said that a Union's minutes were a matter of public record. The court also ruled that only so much of the lawyer's communication

to treat as a waiver that which the client did not intend as such? In our hypothetical, the privilege belongs to client A, who has assuredly not waived it.

Most firms in this position would suggest that XYZ rewrite the audit letter request, limiting its scope to matters currently being litigated or work currently being done by the law firm.[11] Does such a course give sufficient consideration to the interests of potential investors? How broad is the duty of the lawyer to disclose?

II. The Courts

Case law delineating the lawyer's obligation in such situations is still scanty. However, a brief survey of the relevant opinions indicates that courts will rule in favor of disclosure in those situations in which it can be demonstrated that the information was material and that third parties could reasonably be assumed to have relied upon either the assertions or the reputation of the lawyer. In situations in which no reliance can be demonstrated, a partial disclosure of a client's communication, as in an audit letter, will not only waive the privilege as to the remainder[12] but may also impose an affirmative duty to disclose the remainder. An example of the sort of situation mandating further disclosure is *Leland Stanford Jr. University v. National Supply Co.*,[13] in which the court found that the directors of a corporation had pointed out the advantages, but not the disadvantages, of a proposed corporate merger. Whenever partial disclosure distorts or misrepresents the true state of affairs, the law will impose a duty to disclose the remainder.[14] When such disclosure is in conflict with the duty of the lawyer to his client, or with the existence of the attorney-client privilege, the courts have generally required disclosure.

Fears v. Burris Manufacturing Co.,[15] for example, involved a state-created privilege. The Fifth Circuit construed the statute in

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to his client as would tend to reveal the client's previous communication to the lawyer was privileged.

In respect to audit letters, the client making the request is waiving the privilege and should be made aware of this. Case law suggests that once any particular matter is alluded to in an audit letter, confidentiality as to that matter is waived, and requirements of disclosure may make less than full discussion insufficient.

[11]Deer, *Lawyers' Responses To Auditors' Requests For Information*, 28 Bus. Law. 947 (1973).

[12]*See* note 10 *supra*.

[13]46 F. Supp. 389 (N.D. Cal. 1942).

[14]Coates v. Lawrence, 46 F. Supp. 414, 423 (S.D. Ga. 1942).

[15]436 F.2d 1357 (5th Cir. 1971). The case involved a provision of the Mississippi Employment Security Law which required each employing unit

such a way as to find that the privilege was not absolute. In *Carr v. Monroe Manufacturing Co.*,[16] in dealing with another statutory privilege, the same court pointed out that the privilege asserted did not exist at common law and found that the "policy of American Courts" was to weigh the "need of the privilege against the need for disclosure."[17] The Sixth Circuit has likewise held that a "special federal interest in seeking the truth" would overcome a state-created privilege.[18]

Whenever the relationship of the lawyer and the client has been other than purely professional, the courts have not hesitated to impose a duty to disclose. Thus, in *United States v. Benjamin*,[19] the Second Circuit found that the relationship involved was a business relationship and side-stepped the client's claim of privilege. The case involved blatant fraud, and the attorney was an active participant; however, the court noted explicitly that the government need not prove complicity but could meet its burden by proving simply that the lawyer had "deliberately closed his eyes to facts he had a duty to see."[20] In a later case, the same court held that the lawyer would be personally liable for a "reckless disregard of whether the statements made were true."[21]

Securities Exchange Commission v. Frank[22] involved false information in a prospectus. The attorney claimed he had merely "rephrased" information of a technical nature for the company and could not be held responsible for its validity. The court held that "a lawyer has no privilege to assist in circulating a statement which he knows to be false simply because the client has furnished it."[23] A lawyer would not be liable for a failure to detect discrepancies in a technical report; however, "a lawyer, no more than others, can escape liability for fraud by closing his eyes to what he saw and could reasonably understand."[24] Left open was the extent of the lawyer's duty, if any, to investigate.

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of the Employment Security Division to keep work records. The express language of the statute prohibited public access to such records and provided that the information contained therein was to be "confidential." The court held that this statutory mandate was insufficient to create a privilege and allowed contents of the records into evidence.

[16]431 F.2d 384 (5th Cir. 1970).

[17]*Id.* at 388.

[18]Patterson v. Norfolk & Western Ry., 489 F.2d 303, 307 (6th Cir. 1973).

[19]328 F.2d 854 (2d Cir. 1963), *cert denied*, 377 U.S. 953 (1964).

[20]328 F.2d at 862.

[21]United States v. Sarantos, 455 F.2d 877, 882 (2d Cir. 1972). "A conscious effort to avoid learning the truth" would be sufficient for liability to attach.

[22]388 F.2d 486 (2d Cir. 1968).

[23]*Id.* at 489.

[24]*Id.*

At least one legal writer has suggested that attorneys working in the securities field will eventually be governed by the same standards of conduct now required of certified public accountants and independent auditors.[25] While the courts have shown little inclination to go so far, cases involving accountants may provide lawyers with a useful analogy. In *Drake v. Thor Power Tool Co.*,[26] the accounting firm of Peat, Marwick, Mitchell and Company was held liable for misstatements in the company's financial report. The court found it immaterial that the firm had not benefitted from the presumably inflated market price of the securities. Noting that "the position of an independent auditor is different from that of other corporate insiders,"[27] the court emphasized that there had been reliance upon the misstatements and ruled that the firm could be prosecuted either for intentional *or* negligent misrepresentation. It is significant that in very similar situations, courts have declined to find liability where there was no public dissemination of the misinformation and, thus, no reliance.[28] In *Fischer v. Kletz*,[29] Peat, Marwick, Mitchell and Company (PMM) was involved in a suit which has particular relevance to the audit letter situation. The firm, in its capacity as an independent auditor, had certified a financial statement for a corporation. Subsequently, as an employee of the firm, it discovered inaccuracies in that report. The court discussed at length the common law duty to disclose.[30] Stressing the element of reliance, the court concluded that "good faith and common hon-

[25]Goldberg, *Policing Responsibilities of the Securities Bar: The Attorney-Client Relationship and the Code of Professional Responsibility*, 19 N.Y.L.F. 221 (1973).

[26]282 F. Supp. 94 (S.D.N.Y. 1967).

[27]*Id.* at 105.

[28]Wessel v. Buhler, 437 F.2d 279 (9th Cir. 1971).

[29]266 F. Supp. 180 (S.D.N.Y. 1967).

[30]*Id.* at 184-85. The Court discussed at some length the common law duty to disclose and acknowledged that the law relating to "passive failure to disclose" was in a state of flux. The court noted that:

> Although the prevailing rule seems to be that there is no liability for tacit nondisclosure, Dean Prosser adds the following important qualification: "to this general rule, if such it be, the courts have developed a number of exceptions, some of which are as yet very ill-defined . . . ." One of those exceptions is that "one who has made a statement and subsequently acquires new information which makes it untrue or misleading, must disclose such information to anyone whom he knows to be still acting on the basis of the original information."

Id. The court further remarked that "Section 551 of the First Restatement of Torts, which is couched in the specific terms of a 'business transaction' is in substantial agreement with Dean Prosser." *Id.* at 185.

esty"[31] demanded disclosure, and that it was irrelevant that PMM had no pecuniary interest in the misrepresentation. "In cases involving affirmative misrepresentation, it is now the settled rule that a misrepresentor can be held liable regardless of his interest."[32] The court extended such liability to include misrepresentation by reason of nondisclosure as well. Intent to deceive is not necessary, the court noted; breach of an objective duty is sufficient. The court acknowledged the difficulty for accountants *and lawyers* under this interpretation of the law, in situations involving competing ethical mandates. The case is significant because the court actually met that issue and resolved it in favor of the duty to disclose.

Garner v. Wolfinbarger[33] contained a full and considered discussion of the factors the judiciary is most likely to weigh when faced with such competing ethical principles. In *Garner,* the court chose to base its holding in favor of disclosure on the "interfamilial" aspect of that litigation, holding that derivative suits were *"inter sese"* and that the attorney-client privilege was thus inapplicable. But the case has been cited most frequently for its dictum that a corporation's need for secrecy, and its right to claim the client's privilege, must be balanced against the stockholder's right to know.[34]

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[31] *Id.* at 188.

[32] *Id.*

[33] 430 F.2d 1093 (1970).

[34] Three cases decided in 1972 make the trend of the law more explicit. In Blakely v. Lisac, 357 F. Supp. 255, 263 (D. Ore. 1972), the court ruled that "one who is presented in the prospectus as a financial advisor . . . is under a duty to at least make a minimal investigation into the accuracy of the prospectus." The court also predicated liability upon the premise that one who permits another to use his "reputation and goodwill" to further a fraudulent scheme may be independently liable under rule 10b-5 of the Securities Exchange Act, 15 U.S.C. § 78j (1970). If the attorney has not exercised due diligence, it is immaterial that he did not profit personally. Here, the court said, the attorney knew "or should have known" that certain information was misleading; he was, therefore, liable to those who had purchased in reliance on the prospectus.

How involved need a law firm be for a court to find that it has lent its "good name" to a stock offering or similar undertaking? Is any mention of the firm in a prospectus sufficient? In Black v. Nora-Tech, Inc., 333 F. Supp. 468 (D. Ore. 1971), designation of the firm as "corporate counsel" was sufficient to make the firm a "participant" in the unlawful transaction. It is likely that the court was influenced by the fact that, under a separate charge, the attorney in question had himself sold stock on the basis of undisclosed inside information; nevertheless, in its holding, the court employed negligence terminology.

In Bailey v. Meister Brau, Inc., 55 F.R.D. 211 (N.D. Ill. 1972), one of the defendants, a former vice-president of Meister Brau who had become president of the newly-acquired subsidiary, refused to testify at a deposition

Securities Exchange Commission v. National Student Marketing Corp.[35] involved a corporate merger. Pursuant to the merger agreement, National Student Marketing (NSM) was to send a so-called "comfort letter" to Interstate, the other party to the merger. The attorneys for Interstate failed to disclose to the stockholders the fact that the contents of that letter did not comport with the terms of the agreement but showed instead that NSM had materially overstated its current earnings through the issuance of unaudited interim financial statements. The attorneys for Interstate proceeded with the closing without revealing the discrepancy to the stockholders. The law firm also allegedly misrepresented the situation to the SEC by submitting a false Form 8-K. Officers and directors subsequently sold some 77,000 shares without disclosing the contents of the comfort letter. Furthermore, the firm backdated certain transactions so that the profits could be included in earlier financial statements. The court held the law firm liable, and the case has been hailed as a landmark which points the way to a new ethic of disclosure.[36] This seems an extravagent construction, since affirmative involvement of the lawyers in the illegal activity was undeniable.

In June of this year, the Second Circuit handed down a significant opinion in the case of *Meyerhofer v. Empire Fire & Marine Insurance Co.*[37] One of the principal figures in *Meyerhofer* was Stuart Charles Goldberg, a member of the New York bar specializing in securities law, a law school professor, and a vocal proponent of full disclosure in all transactions involving public offerings.[38] As an associate of a large, well-known law firm, Goldberg participated in the preparation of a public offering by Empire Fire and Marine Insurance. The registration statement filed with the SEC failed to disclose a proposed $200,000 payment to the law firm, as well as certain other "compensation arrangements." When stockholders subsequently brought suit under rule 10b-5, naming Empire, the law firm and Goldberg among the defendants, Goldberg asked plaintiff's attorneys for an op-

about certain communications with counsel for Meister Brau. At the time those conversations occurred, he had been an officer of both companies. The court noted that there was raised a question of first impression in Illinois, that is, where does duty lie when an individual functioning in a dual fiduciary capacity faces incompatible obligations? The court found that the information plaintiff wanted was pinpointed with specificity and was unavailable elsewhere. The court, applying the balancing test enunciated in *Garner*, concluded that he had shown sufficient "good cause" to overcome the privilege.

[35][1971-72 Transfer Binder] CCH FED. SEC. L. REP. ¶ 93.360 (1972).

[36]Note, *A New Ethic of Disclosure*—National Student Marketing *and the Attorney-Client Privilege*, 48 NOTRE DAME LAW. 661 (1973).

[37]497 F.2d 1190 (2d Cir. 1974).

[38]See note 25 *supra*.

portunity to demonstrate that he had no knowledge of the nondisclosures at the time. He revealed that he had resigned from the law firm in a dispute over what he regarded as excessive fees, both in the *Empire* matter and in regard to another registration. Upon resigning, he had gone directly to the SEC with a thirty page statement. All of this had occurred some three months before he was named as a defendant in the *Meyerhofer* suit. In order to verify his nonparticipation in any wrongdoing, Goldberg gave the attorneys for the plaintiff a copy of the statement he had given to the SEC, a statement which contained information not only about Empire, but also about another client as well. Plaintiffs subsequently dropped Goldberg as a defendant and amended their original complaint by adding factual matter garnered from Goldberg's statement. The District Court for the Southern District of New York agreed with the defendants that Goldberg had violated Canons Four and Nine. The Second Circuit unanimously disagreed, noting that the Code of Professional Responsibility expressly permits a lawyer to reveal confidences if necessary to defend himself against accusations of wrongful conduct.

> Under these circumstances, Goldberg had the right to make an appropriate disclosure with respect to his role in the public offering. Concomitantly, he had the right to support his version of the facts with suitable evidence.[39]

The court noted that the documents turned over to the SEC and to the plaintiffs reflected seriously upon both Goldberg's former employer and another client but concluded that the urgency of Goldberg's situation, and the absence of any evidence of bad faith on his part, justified the disclosure.

III. The Commentators

There is consensus in the legal literature that, insofar as securities law is concerned, there is a serious conflict between the attorney-client privilege and the lawyer's duty to disclose. Unfortunately, that is where consensus ends and acrimonious debate begins. That debate involves a fundamental disagreement over the nature of the role of the securities lawyer. Is he an advocate, in the traditional American sense? Or is he, by virtue of his highly specialized practice, more of an advisor-participant? If the latter, how does that alter his ethical responsibilities?

The Ethical Considerations following Canon Seven distinguish between the lawyer as advocate and the lawyer as advisor. "A

[39] 497 F.2d at 1195.

lawyer may serve simultaneously as both advocate and advisor, but the two roles are essentially different."[40] The Code draws a distinction on the basis of past versus present behavior; an attorney faced with a client's *fait accompli* is automatically an "advocate" who must take the facts as he finds them; a lawyer assisting his client in determining an ongoing or future course of conduct is an "advisor." An advisor presumably has a greater duty to third parties than does an advocate.

Many lawyers disagree sharply with this purported dichotomy of lawyering functions and fear that under such an analysis there is danger of the securities bar becoming a "wholly owned subsidiary" of the SEC.[41] Drawing a distinction between the "advocate" and "advisor," according to these lawyers, ignores the fundamental nature of our legal system. Every attorney is an advocate, whether or not he or she ever enters a courtroom; it is the essence of the attorney-client relationship that the attorney work in the client's best interests. To threaten the zealous attorney with personal liabilities is to deprive the client of a fundamental right. Even a corporate client is entitled to disclose to its attorney information about its most important affairs and to receive both counselling and advocacy based on that information, secure in the knowledge that the attorney's primary obligation is to that client. A lawyer who is, in effect, a "coerced informant" for the SEC simply cannot give his client the sort of legal representation which is his right under the Constitution.[42] "A role which depends upon the existence of the confidence a client has in his lawyer cannot endure efforts to create enforcement responsibility on the part of the lawyer."[43] Furthermore, SEC regulations are often ambiguous, and there are many situations in which the need for disclosure is arguable. If the lawyer knows that he will be held responsible for omissions which later prove to be material, his instinct for self-preservation is going to influence his advice to his client. What becomes, then, of his duty to show his client how to "avail himself to the full of what the law permits"?[44]

Lawyers taking this position view with dismay the current trend to impose legal liability on attorneys who have acted in reli-

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[40]ABA CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Consideration 7-3 (1970).

[41]Freeman, *Legal Ethics*, 171 N.Y.L.J. 79 (1974).

[42]*Id.*

[43]Cooney, *Implications of the Revolution in Securities Regulation for Lawyers*, 29 BUS. LAW. 129, 132 (1974). *See also* Messer, *Roles and Reasonable Expectations of the Underwriter, Lawyer, and Independent Securities Auditor in the Efficient Provision of Verified Information: 'Truth in Securities' Reinforced*, 52 NEB. L. REV. 429 (1973).

[44]See Cooney, *supra* note 43, at 153.

ance upon misrepresentations of their clients. A reading of the cases does indicate that the lawyer has some, although poorly defined, positive duty of investigation. Thus, before the securities practitioner can safely draw up documents or make presentations to the SEC, he must satisfy himself, through the exercise of "due diligence" that his client has not lied to him. The practical implications of such a duty are staggering enough; the implications for the attorney-client relationship, which is presumably grounded in trust, are even more ominous. The Code of Professional Responsibility eschews conflicts of interest; making the securities practitioner into "another cop on the beat"[45] would seem to pose a conflict of gigantic proportions. Finally, this argument continues:

> If securities regulation is worth doing, it is worth providing sufficient governmental resources to do the job in a way that comports with due process of law, and in a way that does not corrupt the attorney-client relationship and gravely threaten the independence of the Bar, which is essential to the maintenance of a free society.[46]

Other writers take a completely different view. They point to the changed nature of the legal process in modern society and particularly in respect to the securities market.[47] According to their argument, the modern securities lawyer has more in common with the traditional London merchant banker than with the orthodox barrister.[48] It is manifestly impossible for the SEC to be effective without the cooperation of the securities bar; no matter how many investigators and independent auditors the SEC might hire, there is no practical substitute for a high ethical standard on the part of those intimately engaged in the preparation of public offerings. That the lawyer is a participant in the process can hardly be denied; when he is the draftsman of documents which will be relied upon by third parties and the public, when he issues written opinions intended solely for those third parties and the public, he is a participant under any rational assessment of the situation. It is obvious that the ethical responsibility of such lawyers must be tripartite: to the public, to the SEC, and to the client.[49]

Those taking this view resist the notion that it represents a major break with traditional ethical considerations. They note that the Code of Professional Responsibility acknowledges the

[45]Freeman, *supra* note 41, at 79.

[46]*Id.*

[47]Lipton, *Securities Bar and SEC Enforcement Defended*, 171 N.Y.L.J. 93 (1974).

[48]*Id.*

[49]*See* Goldberg, *supra* note 25.

existence of the advocate-advisor dichotomy and that the legal process has always favored disclosure over claims of privilege. Indeed, some writers feel that the attorney-client privilege is no longer applicable in the securities area, and that the doctrine of waiver should be invoked whenever there has been publication of documents based on client communications, upon which third parties might be expected to rely.[50]

There is a tremendous opportunity for fraud in securities trading. Surely the lawyer involved in preparing a public offering has a duty to those who will foreseeably rely upon the information disseminated. Indeed, since it is impossible to perpetrate a securities fraud without either the active assistance or the culpable negligence of a securities lawyer, it is only reasonable to hold lawyers accountable for such assistance or negligence. Proponents of this view support various proposals which would make securities lawyers independently accountable, much as independent auditors are. Many favor codifying the "special" obligations of securities practitioners and abolishing altogether the attorney-client privilege in the securities context.[51]

IV. Analysis

Much of the discussion being generated in this area is the result of a mistake in *focus*. The question being asked is: which is more important, disclosure or the privilege?[52] We should consider carefully whether this is really the appropriate question. The following propositions are offered for consideration.

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[50] *Id.*

[51] Sonde, *The Responsibilities of Professionals Under the Federal Securities Laws—Some Observations*, 68 Nw. U.L. Rev. 1 (1973).

[52] This was essentially the question to which the ABA Section of Corporation, Banking and Business Law attempted to respond when it issued *Proposed Guidelines on the Scope of Lawyers' Responses to Auditors' Requests for Information.* The proposed guidelines, issued October 20, 1974, are being circulated in pamphlet form for discussion and eventual approval by the Section. As the introductory comment explains, the

> fundamental issue presented is the possible implications for lawyers, in dealing with auditors' inquiries, as the position taken relates to both the traditional protections for confidences and secrets (including the attorney-client privilege) and the lawyer's responsibilities in advising clients regarding disclosure obligations under the Federal securities laws.
>
> The following represents an effort by the Section to arrive at a reasonable resolution of the different viewpoints of the two professions, one bottomed on full disclosure requirements for corporate financial statements, and the other bottomed on important public policy reasons for the maintenance of confidential attorney-client relationships.

Once the question has been formulated in that fashion, what follows is inevit-

The securities practice is really *not* significantly different from other kinds of business practice. Most lawyers perform both as advisors and as advocates and, as a practical matter, it is impossible to say where advising ends and advocacy begins—the two functions complement and inform each other. This is particularly true as to clients for whom the attorney performs a wide range of services. It is not unusual to be defending a corporate client in an anti-trust suit, or a products liability suit, or a labor dispute and, at the same time, to be engaged in drafting corporate by-laws, or contracts, or documents for a public offering. Nor is reliance by third parties upon representations made by the lawyer unique to the securities transaction. Certainly, whenever any lawyer drafts a document which will affect third parties, he should be liable for negligence or for criminal misrepresentation—and so he is—under present legal principles.

To suggest abolishing the attorney-client privilege in this context is to use an axe where a penknife will do. It is instructive that the courts have very carefully *refrained* from reaching this result; instead, they have applied exceptions in situations in which disclosures have been warranted. The Code of Professional Responsibility permits a lawyer to reveal confidential communications when the client has waived confidentiality, when the information is required by law or by court order, when necessary to defend himself against accusations of wrongful conduct, and when necessary to prevent the client from consummating a fraud or a crime. These are exceptions broad enough to achieve the necessary flow of information to the public—there is simply no need to go further. The attorney-client privilege has always been strictly construed; the policy of the law has always favored exposure over secrecy. But the courts have likewise recognized the necessity of the principle of confidentiality. It seems altogether reasonable to assume that, should the attorney-client privilege be abolished, and attorneys placed under a positive duty of disclosure, the result would be massive misrepresentations by clients to their lawyers. Deprived of the assurance that the lawyer is its advocate, deprived of the knowledge that what is imparted will be kept confidential, the corporate client will simply fail to give its lawyer the whole truth. This will result in poorer representation of that client by that lawyer, and it will result in *less* public disclosure, not more.

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ably an attempt at compromise rather than a resolution of the problem. This is not to deny the merit of the proposals: they seem workable and reflect careful consideration of the questions involved. The drafters have included excellent statements of the public policy considerations which must underlie any attempt at positive rulemaking. Nevertheless, having once framed the problem in terms of two essentially antagonistic goals, the drafters have unwittingly limited the scope of any potential response.

When one speaks of the "need for disclosure," one is really aiming at two types of serious misrepresentation. One is talking about affirmative fraud and about the omission of material information—passive fraud. Both should be covered by the exception in the Code for fraudulent or illegal activity. Much of the hue and cry over the emergence of a "new ethic of disclosure" is, sadly, the result of the fact that this exception has been invoked far too infrequently. The rule isn't new, but the enforcement of the rule is. Enforcement is salutary both for the public and for the bar and is long overdue. There is no need to fashion a new ethic; there is a need to live up to the ethic currently professed.

Much the same sort of argument is pertinent when one considers imposing a "positive duty of investigation" upon the securities practitioner. Such a duty, to the extent that it is tenable, is already embodied in traditional negligence law. The standard is one of "due diligence under the circumstances," that is, the care which a prudent man, under all of the pertinent circumstances, would exercise. The utility of the standard lies in its flexibility. One suspects that it is precisely that quality, however, that frustrates many commentators. All of the debate in this area, all the discussion, has been focused upon a search for a *rule* that would cover all the contingencies, that would spell out with precision the duty of the attorney in all conceivable circumstances, that would remove the necessity for making hard decisions. It can't be done. The individual lawyer must still decide whether a given fact is material, whether a client's corporate books look suspicious, or whether a client is genuinely over-optimistic or trying to perpetrate a fraud.

Legislators have tried for untold generations to produce laws so specific, so "ironclad," that they would require no interpretation by the courts. Their efforts have been notably unsuccessful. The genius of the common law is its capacity for growth; the great strength of case law is its adaptability. A good judge approaches legal doctrines from the equity side of the bench and aims to achieve substantial justice. The price we pay for this is a certain lack of predictability, stare decisis notwithstanding.

The central question is not whether disclosure or privilege is more important. Rather, the question should be what *degree of participation* by an attorney is sufficient to justify the imposition of liability for active or passive fraud? In criminal terms, what makes a lawyer liable for "aiding and abetting"? That is the standard that needs clarification and the area in which positive rulemaking would be least inappropriate.

One can hardly speak meaningfully about a duty to investigate unless one first establishes what is meant by participation, for the investigative duty, if any, will depend upon the degree to which the lawyer is involved in the transactions of the client. To use negligence terminology, that level will determine the "standard of care."

Lawyers above all men should realize the impossibility of demanding that the law be "neat." The most difficult decisions are not choices between right and wrong, good and evil, purity and corruption. Those are easy. The difficulty comes when one must choose between competing goods; and it is precisely because those choices are so difficult that we cannot afford to legislate them. The case law in this area, as in others, has demonstrated its capacity for growth. The courts are using traditional doctrines of ethics and tort law to reach results which some commentators would reach by drastically amending some of our most basic assumptions about the law and the lawyer's role. The name of that process is overkill, and it is unwise.

SHEILA SUESS

Exhaustion of State Administrative Remedies Under the Civil Rights Act

I. The Doctrine of Exhaustion

A. General Nature

The doctrine of exhaustion of administrative remedies concerns the "completion or lack of completion"[1] of prescribed institutional procedures other than judicial procedures. Although this doctrine can be a congressionally imposed requirement,[2] it is more often a self-imposed policy of restraint allowing courts to narrow the scope of their jurisdiction. As such it is a "pseudo-jurisdictional" requirement based upon considerations of comity and equitable discretion.[3]

It is a "long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."[4] This rule has been applied in cases involving a failure to exhaust state administrative remedies as well as in cases involving exhaustion of federal remedies.[5] Since exhaustion concerns the satisfaction of certain prerequisites prior to the institution of judicial proceedings, it is, therefore, similar to the doc-

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[1]3 K. Davis, Administrative Law Treatise § 20.01, at 57 (1958) [hereinafter cited as 3 Davis].

[2]Federal habeas corpus, 28 U.S.C. § 2254(b) (1970), is an example of congressionally imposed restraint. This statute specifically provides that courts cannot hear a case until state corrective processes are complete or unless such processes are inadequate. *See also* Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* (1970).

[3]Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908); C. Wright, Law of Federal Courts § 49 (2d ed. 1970); Note, *Constitutional Law: Civil Rights—A Consideration of Federal Equitable Intervention and State Procedural Sovereignty*, 8 Wake Forest L. Rev. 442 (1972).

[4]Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938). *See* Franklin v. Jonco Aircraft Corp., 346 U.S. 868 (1953); Aircraft & Diesel Equip. Corp. v. Hirsch, 331 U.S. 752 (1947); Illinois Commerce Comm'n v. Thompson, 318 U.S. 675, 686 (1943); First Nat'l Bank v. Board of County Comm'rs, 264 U.S. 450 (1924); Pacific Live Stock Co. v. Lewis, 241 U.S. 440 (1916); Marin v. University of P.R., 346 F. Supp. 470, 476 (D.P.R. 1972).

[5]For example, in Illinois Commerce Comm'n v. Thompson, 318 U.S. 675 (1943), the Supreme Court refused to uphold a challenge to fares set by the Illinois Commerce Commission because the plaintiff failed to first pursue the administrative remedy afforded him before the commission. Similarly, in First Nat'l Bank v. Board of County Comm'rs, 264 U.S. 450 (1924), the Court held that the bank was compelled to exhaust state administrative remedies before challenging a tax appraisal in federal court.

trine of abstention.[6] They are, however, separate doctrines and should not be confused. Nor should exhaustion be confused with jurisdictional requirements based on statutory interpretations.[7]

Although only exhaustion requirements of the federal courts will be discussed herein, it should be noted that exhaustion is a doctrine of both state and federal courts. As in federal courts, a state court may refuse to hear a case in which administrative remedies have been by-passed.

B. Rationales for the Exhaustion Requirement

There are many reasons for requiring that administrative remedies be exhausted. First, federal courts, when asked to review state administrative proceedings, desire to avoid friction which may result when state remedies are by-passed. This policy is thought to exemplify the principles of federalism, taking into consideration not only the position the federal judiciary occupies in our scheme of government, but also reflecting the federal courts' recognition of a state's interest in a comprehensive scheme of regulation and in not having that scheme prematurely interrupted.[8]

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[6]The doctrines are similar in that they both concern points at which it is proper for a court to entertain a lawsuit. If that point has not yet been reached, under both doctrines, the court will dismiss the case but will grant wide rights of return once compliance with the doctrines has been achieved. Several distinctions between the two doctrines have been suggested: first, exhaustion is a jurisdictional or quasi-jurisdictional requirement whereas abstention is a policy designed to avoid premature decisions of constitutional questions. *See* Kennedy & Schoonover, *Federal Declaratory and Injunctive Relief under the Burger Court*, 26 SW. L.J. 282, 286 (1972). A second distinction is that abstention relates only to the completion of state judicial remedies while the doctrine of exhaustion relates only to the fulfillment of administrative requirements. *See* Potwora v. Dillon, 386 F.2d 74, 77 (2d Cir. 1967). *But see* Comment, *Exhaustion of State Remedies Under the Civil Rights Act*, 68 COLUM. L. REV. 1201, 1205 (1968). A final distinction is made on the basis of the jurisdictional power a court has to hear a particular case. For example, since exhaustion is a prerequisite to entering court, the failure to exhaust means that a court has no "jurisdiction" and, therefore, the case must be dismissed. *See* 17 VILL. L. REV. 336, 338 n.13 (1971). If abstention is involved, all the prerequisites necessary to give a court jurisdiction (such as exhaustion) have been satisfied; the court has jurisdiction but, in its discretion, declines to exercise it. Moreno v. Henckel, 431 F.2d 1299, 1307 (5th Cir. 1970).

[7]Such statutory interpretations would mean that courts would have no jurisdiction to hear cases regardless of exhaustion. Such a statutory interpretation, called deferral, has been advanced in section 1983 cases which would, under certain circumstances, prevent a federal court from ever hearing the case. Note, *Limiting the Section 1983 Action in the Wake of* Monroe v. Pape, 82 HARV. L. REV. 1486, 1498 (1969).

[8]Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341, 350 (1951);

Secondly, the courts also desire to avoid strained relations with the other branches of government. As the United States Supreme Court said in *McKart v. United States*,[9] "[t]he administrative agency is created as a separate entity and invested with certain powers and duties. . . . As Professor Jaffe puts it, '[t]he exhaustion doctrine is, therefore, an expression of executive and administrative autonomy.'"[10]

Thirdly, efficiency is hoped for in allowing the administrative procedure to run its course. This efficiency may result from the "sifting" function an agency performs, since cases may be resolved or settled during the administrative process, thereby avoiding lengthy and expensive litigation. This lessens the burden on the federal judiciary[11] and allows a plaintiff to pursue a more flexible, less expensive and less time-consuming remedy. Further, the development of a factual background during the course of the administrative proceeding provides a record the court may consult. Thus, district courts will not be forced to decide cases "in a vacuum."[12]

Requiring exhaustion also takes advantage of the expertise of administrative agents.[13] Ideally, agencies will be composed of persons who are knowledgeable in an agency's particular area, have knowledge of pertinent local factors and, through experience, have learned the practical consequences and related problems involved in different solutions to a disagreement. Such expertise may be lacking in the courts.

A fourth reason for requiring exhaustion, closely related to efficiency, is the courts' assumption that an agency will decide the matter not only quickly but correctly.[14] Moreover, if the initial agency determination is incorrect, courts assume that such errors will be corrected as the plaintiff progresses through the admin-

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Buford v. Sun Oil Co., 319 U.S. 315 (1943). *See generally* Graham, *The Federal Courts and Exhaustion of State Remedies*, 36 CONN. B.J. 60 (1962).

[9]395 U.S. 185 (1969). *McKart* is the most definitive case on the reasons for requiring exhaustion. *See* 3 DAVIS, *supra* note 1, § 20.01 (Supp. 1970).

[10]395 U.S. at 194, *quoting from* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 425 (1965).

[11]41 GEO. WASH. L. REV. 657, 661 (1973); 17 VILL. L. REV. 336 (1971).

[12]Ogletree v. McNamara, 449 F.2d 93, 99 (6th Cir. 1971).

[13]This is probably the most cited reason for requiring exhaustion of administrative remedies. See United States v. Radio Corp. of America, 358 U.S. 334 (1959), for an example of the Supreme Court's reliance on this rationale. *See generally* Comment, *Exhaustion of State Remedies Under the Civil Rights Act*, 68 COLUM. L. REV. 1201, 1206 (1968); Note, *Administrative Law—Judicial Review—Agency Misconduct—The Doctrine of Exhaustion of Administrative Remedies*, 18 WAYNE L. REV. 1403, 1413 (1972).

[14]Public Welfare Comm'n v. State, 87 Okla. 654, 105 P.2d 547 (1940).

istrative appeal.[15] In this manner, agencies become self-policing. Since agencies know their decisions will ultimately be reviewed by the courts, they have an incentive to correct their own errors. Such an incentive would be absent if their procedures were easily by-passed.

Finally, by requiring completion of the administrative process, courts are assured of finality in the cases which reach them; thus a final institutional decision which affects the plaintiff will be presented for court review. This is roughly comparable to the courts' requirement of "finality of decision" in cases on appeal from lower courts.[16] Such finality is also understandable as part of standing, ripeness or justiciability considerations and, therefore, as falling within the United States Constitution's Article III case or controversy requirement.[17]

C. Exceptions to Application of the Exhaustion Requirement

In spite of the powerful rationales for the exhaustion doctrine, exhaustion is not required, nor should it be required, in all situations. Generally, exhaustion will not be required if the administrative remedy established by the state is inadequate or if pursuing the remedy would be futile. Inadequacy of the remedy may be found if agency delays are unwarranted or if there is some doubt as to whether an agency has the power to grant the relief sought.[18] Inadequacy may also be found if an agency is biased toward one of the parties before it.[19] This often occurs when the agency has a financial interest in the matter before it or when it simply does not want a plaintiff to pursue his available channels of relief.

There is some indication that an administrative remedy may be found inadequate when constitutional questions are involved since courts, not agencies, are the experts in that area.[20] Although inadequacy and futility appear to be different grounds for finding

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[15]Preiser v. Rodriguez, 411 U.S. 475, 490 (1973); Vistamar, Inc. v. Vazquez, 337 F. Supp. 375, 379 (D.P.R. 1971); 3 DAVIS, *supra* note 1, § 21, at 644 (Supp. 1970).

[16]North Dakota State Bd. of Pharmacy v. Snyder's Drug Store, Inc., 414 U.S. 156 (1973); Radio Station WOW v. Johnson, 326 U.S. 120, 124 (1945).

[17]Baron v. O'Sullivan, 258 F.2d 336 (3d Cir. 1958); H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 858 (1953).

[18]Union Pac. R.R. v. Board of Comm'rs, 247 U.S. 282 (1918).

[19]Gibson v. Berryhill, 411 U.S. 564 (1973); Kelly v. Board of Educ., 159 F. Supp. 272 (M.D. Tenn. 1958).

[20]See note 93 *infra*.

a remedy insufficient, they have, in fact, been used interchangeably. Hence, no clear line of division appears between them.

A further exception to the exhaustion doctrine appears to be in the important field of civil rights litigation. This is a recent exception to the exhaustion rule and its impact as yet is not fully known. However, it does appear that a civil rights plaintiff will no longer be required to exhaust his administrative remedies. Whether the doctrine of exhaustion of state administrative remedies has been or should be abrogated in civil rights cases is the subject of this Note.

II. Exhaustion and Section 1983

A. Provisions and Use of Section 1983

Historically, section 1983 was passed as part of the Ku Klux Klan Act of 1871. It provides a private federal remedy for persons who are deprived of rights under color of state law.[21] This section may be employed by anyone deprived of a federal or constitutional right through the agency of a state. The one requirement is state action in some form. State action may be found when a state government is directly involved or when it is indirectly involved through control or financing of an institution. For example, the statute applies to public school systems,[22] prisons,[23] state agencies[24] and police departments.[25]

Although its language is fairly broad and inclusive, the section has not, until recently, been a powerful weapon for the protection, against state encroachment, of federal rights.[26] Beginning in the 1940's, however, the Supreme Court began to broaden the scope of the statute by expanding the meaning of the "under color of"

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[21]42 U.S.C. § 1983 (1970) states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[22]*See, e.g.*, McNeese v. Board of Educ., 373 U.S. 668 (1963); Stevenson v. Board of Educ., 426 F.2d 1154 (5th Cir.), *cert. denied*, 400 U.S. 957 (1970).

[23]Preiser v. Rodriguez, 411 U.S. 475 (1973); Houghton v. Shafer, 392 U.S. 639 (1968).

[24]Powell v. Workmen's Comp. Bd., 327 F.2d 131 (2d Cir. 1964).

[25]District of Columbia v. Carter, 409 U.S. 418 (1973).

[26]This section had been limited by the Civil Rights Cases, 109 U.S. 3 (1883), and United States v. Cruikshank, 92 U.S. 542 (1875), to actions only of the state.

language of section 1983.[27] This expansion also prompted courts to allow plaintiffs suing under section 1983 easier judicial access. Since exhaustion of state administrative remedies presents one of the bars to federal court suits, it has been attacked by those wishing to expand the access to federal courts.

B. The Increasing Trend Toward a No-Exhaustion Rule

The "requirement that a plaintiff exhaust state administrative remedies before he may maintain a suit in equity under section 1983 was once black letter law."[28] But, with the growth in the scope and effectiveness of section 1983, courts have seemingly begun to shift toward a no-exhaustion requirement. However, the cases concerning this specific point are unclear and it is arguable that not all section 1983 cases fall within a new no-exhaustion rule. The confusion surrounding these cases derives partly from the factual contexts of the cases (most fall within traditional "inadequate" or "futile" exceptions) and partly from the puzzling brevity of the courts' explanations for such a no-exhaustion rule.

The Supreme Court has been the leader in this new wave of thought. In *Monroe v. Pape,*[29] the Supreme Court examined section 1983 and ascertained that exhaustion of judicial remedies should not be required. *McNeese v. Board of Education*[30] expanded this holding to remedies which are administrative in nature. This rationale was subsequently adopted in several other Supreme Court cases, including two cases decided quite recently. An examination of these cases is helpful in understanding a no-exhaustion exception and the reasons why this may or may not have been the intention of the Supreme Court.

C. The Monroe v. Pape *Breakthrough*

In *Monroe,* an Illinois resident brought suit against the City of Chicago and individual Chicago police officers who, while acting

[27]The reach of section 1983 has been held to cover all constitutional rights and to extend to actions of private individuals acting under color of state law. *See* Screws v. United States, 325 U.S. 91 (1945); United States v. Classic, 313 U.S. 299 (1941); Hague v. CIO, 307 U.S. 496 (1939). *See also* Note, *The Civil Rights Act of 1871: Continuing Vitality,* 40 NOTRE DAME LAW. 70, 71 (1964).

[28]Note, *Limiting the Section 1983 Action in the Wake of* Monroe v. Pape, 82 HARV. L. REV. 1486, 1500 (1969). For cases in accord, see Parham v. Dove, 271 F.2d 132 (8th Cir. 1959); Carson v. Board of Educ., 227 F.2d 789, 790-91 (4th Cir. 1955), *mandamus denied on same ground sub nom.* Carson v. Warlick, 238 F.2d 724 (4th Cir. 1956), *cert. denied,* 353 U.S. 910 (1957); Cobb v. City of Malden, 202 F.2d 701 (1st Cir. 1953); Davis v. Arn, 199 F.2d 424, 425 (5th Cir. 1952).

[29]365 U.S. 167 (1961).

[30]373 U.S. 668 (1963).

under color of state law, allegedly had committed an illegal search of his home. Plaintiff sought damages under section 1983. The action could have been brought under state law in state court since the policemen's alleged conduct was illegal under Illinois law. In reaching the exhaustion issue, the Court first had to resolve two important questions. One was whether the City of Chicago could be sued under section 1983. The second was whether the policemen were acting "under color of state law" since their actions were illegal under Illinois law. If the Court found no action under color of state law, the plaintiff could not bring suit under section 1983 regardless of the exhaustion question. The Court concluded that the City of Chicago could not be sued as a "person" under section 1983 and that the conduct of the policemen was action under color of state law. In resolving these difficult questions, the Court examined the history of section 1983 and the purposes sought to be served by its passage. The Court concluded that the purpose of section 1983 was to override particular state laws, to provide a remedy when state law was inadequate, and to provide a federal remedy when the state remedy, though adequate in theory, was not available in practice.[31] Under these rationales, the plaintiff would have been required to exhaust his state judicial remedy since there was no showing that the state law was inadequate or that the remedy was not available in practice. Therefore, the Court defined a fourth purpose which has generally been incorporated with the first three by later interpretations of *Monroe*. The Court held that, even if the state has a remedy which would give relief if enforced, the "federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."[32]

Nothing in *Monroe* pertained to the exhaustion of state administrative remedies. The Court's decision that judicial remedies need not be exhausted was not a remarkable development or change in the existing law. Exhaustion of judicial remedies had generally not been required before relief was sought in a federal court.[33] It is arguable whether the Court meant to be laying a foundation for a no-exhaustion principle applicable to exhaustion of administrative procedures.[34] Certainly the "fourth purpose" is

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[31]365 U.S. at 173-74.

[32]*Id.* at 183.

[33]Bacon v. Rutland Ry., 232 U.S. 134 (1914); Baron v. O'Sullivan, 258 F.2d 336 (3d Cir. 1958). If an agency's function is of a judicial, rather than discretionary or initiatory, nature, exhaustion will not be required. Russo v. Central School Dist., 469 F.2d 623 (2d Cir. 1972).

[34]Metcalf v. Swank, 444 F.2d 1353 (7th Cir. 1971), *vacated*, 406 U.S. 914 (1972); Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969), *cert. denied*, 400

couched in language broad enough to support such an interpretation, but the problem remains unresolved. Further, *Monroe* was a suit for legal, rather than equitable, relief. This has led some to interpret its no-exhaustion requirement as applicable only to cases when legal relief, such as damages, is sought.[35]

D. McNeese *and Administrative Remedies*

It was not long before the Court extended the *Monroe* holding to include cases involving administrative exhaustion problems. The first such application was in *McNeese v. Board of Education.*[36] In that case, black students alleged racial discrimination in an Illinois public school system and brought suit under section 1983 for equitable relief. The suit was dismissed by the district and appellate courts for failure to exhaust available administrative remedies. The administrative remedy available to the plaintiffs provided that residents could file a complaint with the Superintendent of Public Instruction who would then hold a hearing. If the Superintendent decided that the allegations were correct, he would *request* the Attorney General to bring suit in the state courts.

The Supreme Court reversed the appellate court's dismissal for two different reasons. First, the Court determined that plaintiffs bringing suit under section 1983 were not subject to an exhaustion requirement and stated that "relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided a remedy."[37] The purposes of the Civil Rights Act, as defined in *Monroe,* demanded a no-exhaustion rule because otherwise, the Court said, these purposes would easily be defeated if federal claims had to wait until available state remedies were completed. The Court held that the only time federal courts should refuse access to their forums is when there are "strands of local law . . . woven into the case."[38] Since there

U.S. 481 (1970). *See also* 3 DAVIS, *supra* note 1, § 20.09, at 668-69 (Supp. 1970).

[35]In Potwora v. Dillon, 386 F.2d 74 (2d Cir. 1967), Judge Friendly declared that, "*Monroe v. Pape* was an action for damages and . . . must be read in that light . . . ." *Id.* at 77. *Accord,* Wright v. McMann, 387 F.2d 519 (2d Cir. 1967). The court recognized *Monroe* as having settled "beyond cavil that exhaustion is not required when only *legal* relief is sought." *Id.* at 523 (emphasis added).

[36]373 U.S. 668 (1963).

[37]*Id.* at 671.

[38]*Id.* at 673. C. WRIGHT, LAW OF FEDERAL COURTS § 49, at 187 n.6 (2d ed. 1970) concurs, stating that a plaintiff need not exhaust his administrative remedies when suing under section 1983 when his claim is based *entirely* on federal law.

were no such "strands" in *McNeese*, the federal courts should have decided the case on the merits.

The second reason for the Court's decision that plaintiffs need not exhaust their state administrative remedies was based on its finding that the remedy was inadequate. Since the most plaintiffs could have achieved by exhausting state remedies was a request from the Superintendent to the Attorney General to bring suit, the Court felt that these remedies afforded only a "tenuous protection" to the plaintiffs' federal rights.[39] It is also interesting to note that the ultimate remedy was, in essence, judicial. These two factors, the inadequacy of the remedy and its essential judicial nature, have been a constant source of irritation to those who favor a broad no-exhaustion rule and a source of inspiration to those who wish to restrict exceptions to the exhaustion doctrine.

After *Monroe*, *McNeese* is the most important case establishing the principle that exhaustion is not required in actions brought pursuant to section 1983. There have been basically four responses to the *McNeese* decision by the courts. It has been held that: (1) *McNeese* totally eliminates the exhaustion requirement;[40] (2) *McNeese* eliminates the exhaustion requirement only in school segregation cases;[41] (3) *McNeese* is only a specific application of the general inadequacy exception to the exhaustion rule;[42] and (4) *McNeese* held only that administrative remedies of a judicial

[39]373 U.S. at 676. Justice Harlan protested this conclusion in his dissenting opinion. He argued that no showing had been made that the remedies were, in fact, inadequate. It was his feeling that the Court should never have heard this case since sound respect for the independence of state action would have dictated its dismissal. *Id.* at 677.

[40]Houghton v. Shafer, 392 U.S. 639 (1968); King v. Smith, 392 U.S. 311 (1968); Damico v. California, 389 U.S. 416 (1967); Moreno v. Henckel, 431 F.2d 1299, 1306 (5th Cir. 1970); Whitner v. Davis, 410 F.2d 24, 28 (9th Cir. 1969); Springfield School Comm. v. Barksdale, 348 F.2d 261 (1st Cir. 1965); Powell v. Workmen's Comp. Bd., 327 F.2d 131 (2d Cir. 1964); Lee v. Hodges, 321 F.2d 480, 484 (4th Cir. 1963); Vistamar, Inc. v. Vazquez, 337 F. Supp. 375 (D.P.R. 1971). *See* Aycock, *Introduction to Certain Members of the Federal Question Family*, 49 N.C.L. REV. 1, 21 (1970); Larson, *The Development of Section 1981 as a Remedy for Racial Discrimination in Private Employment*, 7 HARV. CIV. RIGHTS–CIV. LIB. L. REV. 56, 86 (1972).

[41]Wright v. McMann, 257 F. Supp. 739 (N.D.N.Y. 1966), *rev'd on other grounds*, 387 F.2d 519 (2d Cir. 1967); United States *ex rel.* Wakely v. Pennsylvania, 247 F. Supp. 7 (E.D. Pa. 1965).

[42]Eisen v. Eastman, 421 F.2d 560, 569 (2d Cir. 1969), *cert. denied*, 400 U.S. 841 (1970); Toney v. Reagan, 326 F. Supp. 1093 (N.D. Cal. 1971), *aff'd*, 467 F.2d 953 (9th Cir. 1972); Note, *Section 1983: A Civil Remedy for the Protection of Federal Rights*, 39 N.Y.U.L. REV. 839, 855 n.116 (1964). The effect of *McNeese* may have been to shift the burden of proof as to the adequacy of the administrative remedy from the plaintiff to the defendant. *See* American Fed'n of State, County & Municipal Employees v. Woodward, 406 F.2d 137, 141 (8th Cir. 1969).

nature need not be exhausted.[43] Professor Davis has even remarked that *McNeese* "seems much more in the nature of a judicial fiat than as a reasoned analysis of the problem on the basis of relevant and related law."[44]

Despite these conflicting interpretations, the Supreme Court has consistently cited *McNeese* as totally eliminating the exhaustion requirement. The problem with the citing cases, however, is that, even though they seem to state that exhaustion is eliminated as a prerequisite, they are subject to the same wide range of construction that so afflicted the *McNeese* decision.

E. Subsequent Supreme Court Decisions

Damico v. California,[45] a case subsequent to *McNeese,* is as unenlightening as its predecessor in its explanation for a no-exhaustion rule. Citing *McNeese* as its authority, the Court, in a brief per curiam opinion, held that "relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided [an administrative] remedy."[46] Although this is a quote from *McNeese,* the words "an administrative" were inserted by the *Damico* Court. That insertion may indicate the Court's awareness of the controversy surrounding *McNeese* and its desire to firmly establish that *McNeese* abolished the exhaustion requirement. On the other hand, it might show that *McNeese* was not applicable to administrative remedies and that the Court was expanding the *McNeese* no-exhaustion requirement to remedies of an administrative nature.[47] The latter explanation may be the

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[43]Metcalf v. Swank, 444 F.2d 1353 (7th Cir. 1971), *vacated,* 406 U.S. 914 (1972).

[44]3 DAVIS, *supra* note 1, § 20.01, at 646 (Supp. 1970).

[45]389 U.S. 416 (1967).

[46]*Id.* at 417, *quoting from* McNeese v. Board of Educ., 373 U.S. 668, 671 (1963) (brackets in original).

[47]Justice Harlan was, again, the lone dissenter. He noted the weakness of the Court's reliance upon *Monroe* and *McNeese.* He especially argued that *Monroe* said nothing about by-passing administrative procedures since it involved only judicial procedures. *McNeese* held only that administrative remedies which were inadequate could be by-passed. Justice Harlan noted:

> This Court, without plenary consideration and without stating its reasons, now reverses the District Court's dismissal, citing *McNeese v. Board of Education* . . . . Although I did not at the time and do not now fully understand the Court's opinion in *McNeese,* the net result of the case as I see it was that the right to assert, in a federal court, that state officials had acted in a manner depriving the plaintiff of clear constitutional rights could not be delayed by the interposition of intentionally or unintentionally *inadequate* state remedies for the alleged discrimination.

Id. at 418-19 (footnotes omitted) (emphasis added).

stronger since the portion of *McNeese* which the Court cited dealt only with judicial, and not administrative, remedies. It is also possible that the *Damico* Court based its decision on the inadequacy of the administrative remedy even though it appeared not to have done so.[48] The action brought by the plaintiffs was for injunctive relief and for a declaration that a state statute was unconstitutional. Since the administrative agency was not competent to declare the statute unconstitutional or to change its terms, plaintiffs' administrative remedy was clearly inadequate.

Courts which interpret *Damico* as holding only that inadequate administrative remedies need not be exhausted generally follow two lines of thought. First, if a statute is attacked, as in *Damico*, because it deprives a plaintiff of a constitutional right, exhaustion is not required. But if the statute is attacked because it deprives a plaintiff of a federal right, the requirement that administrative remedies be exhausted is still effective. The second line of thought interprets *Damico* to hold that, if a statute is attacked because it is unconstitutional on its face, administrative remedies are inadequate and exhaustion will not be required. But if the statute is attacked because it is unconstitutional "as applied," the administrative remedy is adequate and exhaustion is necessary in order to determine the finality of the administrative decision.[49]

The first line of thought seemed to be upheld by *King v. Smith*,[50] the next Supreme Court case discussing exhaustion. Therein, the Court, dismissing the exhaustion issue in a footnote, stated that remedies do not have to be exhausted when the "constitutional challenge is sufficiently substantial, as here, to require the convening of a three-judge court."[51] This distinction, however, was shortly thereafter eliminated in *Houghton v. Shafer*.[52]

Houghton, like the other cases, is weak support for the principle that exhaustion of administrative remedies is not required in section 1983 suits because, on the facts of that case, exhaustion

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[48]The *Damico* Court stated: "The three-judge District Court dismissed the complaint solely because 'it appear[ed] to the Court that all of the plaintiffs [had] failed to exhaust adequate administrative remedies.' This was error." *Id.* at 416-17. It thus appears that even adequate administrative remedies do not have to be exhausted.

[49]Metcalf v. Swank, 444 F.2d 1353 (7th Cir. 1971), *vacated*, 406 U.S. 914 (1972).

[50]392 U.S. 309 (1968) (plaintiffs challenged the constitutionality of Alabama's "substitute father" regulation).

[51]*Id.* at 312 n.4. *See* Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969), *cert. denied*, 400 U.S. 841 (1970); Nichols v. Schaffer, 344 F. Supp. 238 (D. Conn. 1972); Schwartz v. Galveston Indep. School Dist., 309 F. Supp. 1034 (S.D. Tex. 1970).

[52]392 U.S. 639 (1968) (confiscation by prison officials of prisoner's legal materials).

would have been futile and, therefore, not required. In *Houghton*, there was a showing that the petitioner, a prison inmate, had petitioned the Deputy Superintendent of his prison for relief, but without avail. It was further shown that later administrative appeals would have reached the same result since the rules under which the Deputy Superintendent's decision was made were correctly applied to the petitioner and the agency was without power to change those rules. Hence requiring plaintiff to exhaust would have been to require a futile act. Under the usual exceptions to the exhaustion rule, no exhaustion would have been required. But the Court added these words: "In any event, resort to these remedies is unnecessary in light of our decisions in *Monroe, McNeese* and *Damico*."[53] This certainly indicates the Court felt a no-exhaustion rule had been established by the three prior cases. But the examination by the Court of the adequacy of the remedy does not preclude a different interpretation of those cases.

Later cases have been equally ambiguous in stating their reasons for not requiring exhaustion. *Wilwording v. Swenson*[54] held simply that the federal remedy is supplementary to the state remedy and the latter need not be invoked before a federal forum can be entered. The Court noted *Houghton's* elimination of the exhaustion requirement.[55] The Court was again careful to examine the adequacy of the administrative remedy. Since the remedy was inadequate, the plaintiff was not required to exhaust it.

Carter v. Stanton[56] concerned the constitutionality of an Indiana welfare regulation requiring a person seeking assistance due to separation or absence of a spouse to wait until the spouse had been continuously absent for six months. Plaintiffs brought suit without exhausting their administrative remedy and a three judge court dismissed. The court alternatively held that no substantial federal question was presented and therefore the three judge court lacked jurisdiction. In a brief per curiam opinion, the Supreme Court vacated the decision, holding that *Damico*, "an indistinguishable case, likewise establishes that exhaustion is not required in circumstances such as those presented here."[57] As in *Damico*, the constitutionality of the statute was in issue and the Court may again have felt that the administrative remedy was inadequate.

Although the cases cited thus far appear to rule unequivocally that exhaustion of administrative remedies is not required

[53] *Id.* at 640.

[54] 404 U.S. 249 (1971) (prisoners challenged both living and disciplinary conditions of their confinement).

[55] *Id.* at 250.

[56] 405 U.S. 669 (1972).

[57] *Id.* at 671.

in actions brought under section 1983, all are mixed with issues of inadequacy or futility, and all lack an adequate explanation for a no-exhaustion rule. Professor Davis expressed this feeling succinctly:

> Whatever reasons the Supreme Court may have for this startling result are obfuscated through the pretense that the *Damico* result followed from *McNeese* and the pretense that the *McNeese* result followed from *Monroe*. The holdings have been largely in the nature of unreasoned fiats, and the results seem altogether unsatisfactory because they are so clearly contrary to such principles as have heretofore been discernible in exhaustion law.[58]

It is his feeling that the Court's result "probably cannot endure."[59]

F. The Recent Supreme Court Decisions

On May 7, 1973, the Supreme Court rendered decisions in two cases involving the issue of exhaustion. In *Preiser v. Rodriguez*,[60] New York inmates deprived of good time credits sought injunctive relief to compel restoration of those credits. Restoration of the credits would have resulted in their immediate release. The question presented to the Court was whether the plaintiffs could sue under section 1983 or whether they were required to pursue their habeas corpus remedies. If section 1983 were available, then no exhaustion of state remedies was necessary; if it were not, relief had to be first sought and denied in the state forums before federal relief would be available. The district court held that this action was properly brought under section 1983 and that the plaintiffs were, therefore, not required to exhaust.[61] The Second Circuit Court of Appeals reversed, stating that the Civil Rights Act was not available when the action was really an application for habeas corpus relief.[62] This decision was subsequently set aside and the case was reheard en banc. The court then affirmed the holding of the district court and found that, according to *Wilwording v. Swenson*,[63] a prisoner's complaint relating to the conditions of his confinement was cognizable either in federal habeas corpus or under the Civil Rights Act.

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[58] 3 DAVIS, *supra* note 1, § 20.09, at 668-69 (Supp. 1970). *See also* Goldfarb & Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 175, 261 (1970).

[59] 3 DAVIS, *supra* note 1, § 20.09, at 669 (Supp. 1970).

[60] 411 U.S. 475 (1973).

[61] 307 F. Supp. 627 (N.D.N.Y. 1969).

[62] 451 F.2d 730 (2d Cir. 1971).

[63] 404 U.S. 249 (1971). See text accompanying notes 54 & 55 *supra*.

The Supreme Court reversed. After examining the history and purposes of habeas corpus, the Court concluded that it is the *exclusive* federal remedy available to prisoners attacking the legality or duration of their confinement. Section 1983 can be used only when the *conditions* of confinement are in issue. The Court found that the petitioners' case fell squarely within the traditional scope of habeas corpus and declared that it "would wholly frustrate explicit congressional intent to hold that the respondents in the present case could evade [the exhaustion] requirement by the simple expedient of putting a different label on their pleadings."[64] The Court found that exhaustion in habeas corpus cases is necessary to further a congressional intent to avoid unnecessary friction between state and federal forums which would result if federal courts did not allow states a chance to correct their own constitutional errors.[65] Federal-state comity demands exhaustion especially in this area since states have a strong interest in a comprehensive scheme of regulation for the administration of their prison systems.

Cases cited by the petitioner were distinguished by the Court. *Wilwording*, the Court said, held that section 1983 was the proper remedy when the conditions of confinement were in issue. That section is not appropriate when the fact or length of confinement is at stake, which was the issue in *Preiser*. Hence, *Wilwording* would not be applicable. The Court found that the other civil rights

[64]411 U.S. at 489-90. *See also* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972); McClelland v. Sigler, 456 F.2d 1266 (8th Cir. 1972); Kirby v. Sutton, 436 F.2d 1082 (5th Cir. 1971).

[65]This attitude, until recently, has been the predominant attitude of the courts toward prisoners' grievances. As Zeigler & Hermann state in *The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts*, 47 N.Y.U.L. REV. 159 (1972):

> Until recently, the federal courts maintained a "hands off" policy in these cases, ruling that they presented questions of internal prison administration in which the judiciary would not meddle. In the past several years, however, the federal courts have acknowledged that prisoners do not leave their constitutional rights behind them when they pass through the prison gates, and recently have moved far to protect these rights . . . .

Id. at 168. *Accord*, Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971). *See also* Grayson v. Montgomery, 421 F.2d 1306 (1st Cir. 1970). In that case, the court noted:

> [T]he Civil Rights Act provides a supplementary federal remedy which may be invoked without exhausting state remedies. . . . While this may be the general rule, federal courts have traditionally been reluctant to exercise their jurisdiction under the Civil Rights Act to intervene in the state criminal process.

Id. at 1308 (citations omitted). Reluctance to interfere generally stems from a strong congressional policy of noninterference with state litigation and from the serious risk of disrupting state law enforcement policies if they are easily by-passed.

cases, holding that section 1983 requires no exhaustion, were also distinguishable because of the absence of an overriding statute showing a different congressional intent.

The distinction made by the majority—that section 1983 is the proper remedy if the conditions of confinement are in issue and that habeas corpus is the sole federal remedy when the fact or duration of the imprisonment is in issue—was attacked in a vigorous dissent by Justice Brennan as "unsound," "unworkable in practice," and "in defiance of the purposes underlying both the exhaustion requirement of habeas corpus and the absence of a comparable requirement under section 1983."[66] This dissent contains the most extensive discussion of a possible rationale for not requiring exhaustion that has, to date, been written. One reason for not requiring exhaustion, Justice Brennan explained, concerns the intent of Congress in passing the Civil Rights Act. Congress recognized important interests which would be served by allowing a plaintiff to choose a federal forum in cases arising under federal law.[67] Congress, therefore, created a judicial duty to respect a plaintiff's forum choice. Justice Brennan remarked that "escape from that duty is not permissible merely because state courts also have the solemn responsibility, equally with the federal courts" to protect federal rights.[68] The dissent noted several purposes which would be served by not requiring exhaustion. First, expertise would be developed. Secondly, uniformity in the protection of federal rights would be attained and, finally, plaintiffs would benefit by having available a more sympathetic and understanding forum.[69] Moreover, the dissent argued, the history of the Act mandates that plaintiffs have a right to a federal forum. Since section 1983 was passed in order to protect federally created rights from nonprotection by state instrumentalities, Congress intended to vest federal courts with the power to intervene between states and their citizens to protect those citizens from "unconstitutional action under color of state law, 'whether that action be executive, legislative or judicial.' "[70] To adequately protect

[66]411 U.S. at 504 (Brennan, Douglas & Marshall, JJ., dissenting).

[67]*Id.* at 514-15.

[68]*Id., quoting from* Robb v. Connolly, 111 U.S. 624, 637 (1885).

[69]Justice Brennan, in a footnote, notes the remarks of Representative Coburn, CONG. GLOBE, 42d Cong., 1st Sess. 460 (1871), to the effect that the federal courts will be better able to enforce this section because they are "above mere local influence; . . . their judges can act with more independence, cannot be put under terror, as local judges can; their sympathies are not so nearly identified with those of the vicinage; the jurors are taken from the State, and not the neighborhood." 411 U.S. at 514.

[70]411 U.S. at 516, *quoting from Ex parte* Virginia, 100 U.S. 339, 346 (1879).

plaintiffs, Congress gave the federal courts the power to intervene immediately, not after the exhaustion of all available administrative remedies. Therefore, the dissent concluded, the absence of an exhaustion requirement in section 1983 cases is not "an accident of history or the result of careless oversight by Congress or this Court. . . . Exhaustion of state remedies is not required precisely because such a requirement would jeopardize the purposes of the Act."[71] A rule of no-exhaustion is, hence, an "integral feature of the statutory scheme."[72] The displacement of the no-exhaustion rule of section 1983 with an action falling under an alternative remedial device which requires exhaustion, the dissent stated, must be clearly justified by considerations of policy or by statements of congressional intent. The dissent could find no such justifications in this case. The dissent then examined the purposes to be served by the habeas corpus exhaustion doctrine and gave several reasons for not requiring exhaustion, especially noting that friction-avoidance would not be served by requiring exhaustion here.

This case would seem to indicate that exceptions to a no-exhaustion rule do exist. One exception exists when a case brought under section 1983 would more properly have been brought under another applicable statute. This exception aids those who argue that the Court has been developing a flexible rule of no-exhaustion and has not totally eliminated the exhaustion doctrine in section 1983 actions.

The same exhaustion question faced the Court in another case, *Gibson v. Berryhill,*[73] decided the same day as *Rodriguez.* In *Gibson,* licensed optometrists employed by a corporation brought suit for injunctive relief against the Board of Optometry and the Alabama Optometric Association. They wished to enjoin pending Board hearings which could result in suspending or revoking their licenses to practice. The defendants claimed that the named optometrists, by accepting employment with a corporation, had violated an Alabama statute forbidding the practice of optometry by individuals not privately employed. The defendant Association was composed solely of optometrists in private practice and the defendant Board was chosen solely from the membership of the Association. Plaintiffs claimed their remedy was inadequate due to bias on the part of Board members in that if plaintiffs' licenses were revoked, their business practice would, of necessity, fall to Board or Association members. Thus the Board members would have a personal financial interest in the outcome of plaintiffs' hearings.

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[71] 411 U.S. at 518.

[72] *Id.*

[73] 411 U.S. 564 (1973).

The problem facing the Court in this case was whether or not an injunction should issue against pending administrative agency decisions, specifically, whether these plaintiffs should first be required to exhaust their administrative remedies before seeking aid in the federal courts.[74] The Court concluded:

> [T]he matter of exhaustion of administrative remedies need not detain us long. Normally when a State has instituted administrative proceedings against an individual who then seeks an injunction in federal court, the exhaustion doctrine would require the court to delay action until the administrative phase of the state proceeding is terminated, at least where coverage or liability is contested and administrative expertise, discretion or fact-finding is involved. But this Court has expressly held in recent years that state administrative remedies need not be exhausted where the federal court plaintiff states an otherwise good cause of action under 42 U.S.C. § 1983.[75]

The Court quickly added: "Whether this is invariably the case . . . is a question we need not now decide."[76] That this language indicates the existence of exceptions to a no-exhaustion rule, as *Rodriguez* may also indicate, is one possible construction.[77] If such a construction is correct, the surrounding language indicates that any exception found in *Gibson* will be construed narrowly and limited solely to those cases in which a plaintiff has not yet been deprived of any rights because an agency hearing is pending and not complete.

The Court concluded that plaintiffs should not be required to exhaust since the Board was unconstitutionally constituted and thus could not provide plaintiffs with an adequate and impartial

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[74]The reason for the Court's hesitancy may have been its desire to establish first whether any of the plaintiffs' rights had been infringed. As the court in Thomas v. Chamberlain, 143 F. Supp. 671 (E.D. Tenn. 1955), *aff'd*, 236 F.2d 417 (6th Cir. 1956), remarked: "How can a United States court determine whether the federal rights of a citizen have been invaded by a state until all the administrative remedies offered by the state have been exercised?" 143 F. Supp. at 676. The Ninth Circuit faced a similar problem in Whitner v. Davis, 410 F.2d 24 (9th Cir. 1969), and reached a different conclusion from the *Gibson* Court. *Whitner* is distinguishable, however, because the remedy in *Whitner* was shown to be adequate and to provide the plaintiff with an opportunity for a fair hearing.

[75]411 U.S. at 574.

[76]*Id.* at 574-75.

[77]This very possibility so worried two members of the Court that they felt compelled to clarify this point in a concurring opinion. Therein, they stated that the rule has been "firmly settled by this Court's prior decisions" in *McNeese, Houghton, King,* and *Damico* that no exhaustion in section 1983 actions is required. *Id.* at 581.

administrative forum in which their rights could be adjudicated. Since the *Younger v. Harris*[78] ruling limiting injunctions against pending state proceedings "presupposes an opportunity to raise and have timely decided by a *competent* state tribunal, the federal issues involved,"[79] and since no such competent body was present here, the proceedings could be enjoined.

G. The Response From Below

In all these cases, has the Court eliminated the exhaustion requirement? The answer generally heard from lower courts is yes, but the issue may not yet be closed. Certainly the cases are subject to, and have received, varying responses.[80] Several circuit courts have very narrowly construed the Supreme Court de-

[78]401 U.S. 37 (1971).

[79]411 U.S. at 577.

[80]For examples of cases holding in line with the Supreme Court's decision that exhaustion is not required in suits brought under section 1983, see Hartmann v. Scott, 488 F.2d 1215 (8th Cir. 1973) (no exhaustion required when constitutionality of a statute is in question); Galligher v. McCarthy, 470 F.2d 740 (9th Cir. 1972) (habeas corpus petition partly treated as brought under section 1983 and, therefore, no exhaustion required for that part); Littleton v. Berbling, 468 F.2d 389 (7th Cir. 1972) (exhaustion of legal or political remedies is not required); Toney v. Reagan, 467 F.2d 953 (9th Cir. 1972) (prospective state administrative remedies must be exhausted); McClelland v. Sigler, 456 F.2d 1266 (8th Cir. 1972) (inmates charged prison officials with racial discrimination); Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972) (state prisoners were not required to exhaust); Hayes v. Secretary of Pub. Safety, 455 F.2d 798 (4th Cir. 1972) (inmates alleged custodial force misconduct); Chisley v. Richland Parish School Bd., 448 F.2d 1251 (5th Cir. 1971) (school teacher alleged that his discharge from the school was attributable to racial motives); Hobbs v. Thompson, 448 F.2d 456 (5th Cir. 1971) (firemen protested an ordinance prohibiting their participation in election campaigns); Burnett v. Short, 441 F.2d 405 (5th Cir. 1971) (plaintiff claimed that his arrest was made with undue force and without inquiry as to whether he had shot a police officer); Rainey v. Jackson State College, 435 F.2d 1031 (5th Cir. 1970) (a college teacher claimed his dismissal violated his civil rights); Jones v. Superintendent, 370 F. Supp. 488 (W.D. Va. 1974) (prisoners not required to exhaust state administrative remedies); Alabama Educ. Ass'n v. Wallace, 362 F. Supp. 682 (M.D. Ala. 1973) (teachers attacking facial unconstitutionality of statute not required to exhaust); Buggs v. City of Minneapolis, 358 F. Supp. 1340 (D. Minn. 1973) (suspended municipal employees not required to exhaust); Boyd v. Smith, 353 F. Supp. 844, 846 (N.D. Ind. 1973) (exhaustion in civil rights cases is not required unless school disciplinary procedures are involved); UAW v. State Farm Ins. Co., 350 F. Supp. 522 (N.D. Ill. 1972) (no exhaustion is required if a statute is challenged as unconstitutional on its face or if remedies are really judicial and not administrative); Inmobiliaria Borinquen, Inc. v. Garcia Santiago, 295 F. Supp. 203 (D.P.R. 1969) (plaintiff alleged that the city's reservation of two parcels of his land for future acquisition deprived him of property without due process of law).

cisions. The Second Circuit in *Eisen v. Eastman*[81] provides just such an example. The case was brought by a plaintiff challenging the constitutionality of a New York City rent control law. After an examination of the available authority holding that exhaustion was not required, the court concluded that those cases "have been given a bigger sweep than the Court intended,"[82] and stated:

> [W]e thus read these decisions as simply condemning a wooden application of the exhaustion doctrine in cases under the Civil Rights Act. . . . We shall need much clearer directions than the Court has yet given or, we believe, will give, before we hold the plaintiffs in such cases may turn their backs on state administrative remedies and rush into a federal forum.[83]

The Supreme Court refused to review this case on a writ of certiorari and it is still law to which the Second Circuit apparently adheres.[84]

The Seventh Circuit has also been reluctant to apply the no-exhaustion rule suggested by the Supreme Court. In *Metcalf v. Swank*,[85] a constitutional challenge under section 1983 was raised against an Illinois public aid regulation controlling shelter allowances. Plaintiff's position was that exhaustion of state administrative remedies was never required under section 1983. The Supreme Court precedents cited by him were examined and interpreted as not requiring an inflexible no-exhaustion rule. The court found

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[81] 421 F.2d 560 (2d Cir. 1969), *cert. denied*, 400 U.S. 841 (1970).

[82] *Id.* at 568. The court read *McNeese* to hold only that exhaustion was not required when the administrative remedies were inadequate. *Damico* and *King* were read to hold only that no exhaustion would be required if the question were substantial enough to require the summoning of a three-judge district court, and *Houghton* was read to hold only that administrative remedies need not be exhausted if pursuing them would be futile.

[83] *Id.* at 569.

[84] In Blanton v. State Univ., 489 F.2d 377, 384 (2d Cir. 1973), the court noted that "*Gibson v. Berryhill* seems to support our conclusion in *Eisen* that the doctrine requiring exhaustion of administrative remedies is not dead in civil rights cases—an interpretation emphasized by the concurring opinions." The *Blanton* court remarked upon the *Gibson* Court's failure to rely upon its prior cases suggesting that exhaustion is never required in civil rights suits. The *Blanton* court concluded that, "therefore, [we] see no occasion to retreat from this portion of *Eisen* . . . ." *Id.* The court, however, refused to find that plaintiffs' failure to exhaust was an absolute bar to this suit. *See also* Ray v. Fritz, 468 F.2d 586, 587 (2d Cir. 1972); James v. Board of Educ., 461 F.2d 566, 570 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972); David v. New York Tel. Co., 341 F. Supp. 944, 947 (S.D.N.Y.), *aff'd on other grounds*, 470 F.2d 191 (2d Cir. 1972). Many other cases agree with *Eisen's* desire for a flexible rule. See cases cited note 89 *infra*.

[85] 444 F.2d 1353 (7th Cir. 1971), *vacated*, 406 U.S. 914 (1972), *noted in* 17 VILL. L. REV. 336 (1971).

no "abrogation of the exhaustion requirement in Civil Rights Act cases . . . . Rather, [it found] only a pattern of flexibility in imposing the exhaustion requirement in this special area."[86] Plaintiffs were required to exhaust. This decision was vacated by the Supreme Court and remanded for further consideration in light of the Court's holding in *Carter*. In addition, recent decisions of the First Circuit Court of Appeals indicate that it may require completion of the administrative process in some cases.[87]

H. Conclusions Derived From These Cases

If any definite rules have emerged from these cases, they are that (1) exhaustion *will not* be required if the administrative remedy is inadequate or if pursuing it will almost certainly be futile, (2) no exhaustion will be required if a statute is attacked on its face or if a constitutional, as opposed to statutory, right is involved or if the only administrative remedy is of a judicial nature, (3) no exhaustion will be required if an agency is unconstitutionally constituted and an action is still pending before it, (4) on the other hand, exhaustion *will* probably be required when

[86]444 F.2d at 1356. The dissenting judge argued that the court had misinterpreted the Supreme Court cases. He felt the Supreme Court had indicated a "broad rule that exhaustion is not required in cases properly brought under the Civil Rights Act." *Id.* at 1361. Noting that the majority formulated an "as applied" test versus a "facial attack" test for those cases which must be exhausted, he argued that this distinction was mechanical, novel and groundless. He then stated that a more proper distinction could be made on the basis of an individual suit versus a class suit.

In a later case, Brooks v. Center Township, 485 F.2d 383 (7th Cir. 1973), the Seventh Circuit again faced the exhaustion question. In this case, plaintiffs attacked the facial constitutionality of an Indiana statute, IND. CODE § 12-2-1-18 (Burns 1973), granting poor relief benefits, because the statute lacked due process pretermination hearings and notice of the reasons for termination. The court held that the plaintiffs were not required to exhaust and stated that, "beginning with *Monroe v. Pape*, however, the Court has persisted in holding that the civil rights remedy . . . is supplementary to any state administrative remedies and that federal jurisdiction may be invoked without exhaustion of state remedies . . . ." 485 F.2d at 386. The court refused to adopt this broad no-exhaustion rule, however, and indicated that the exhaustion question "remains open." *Id.*

[87]Raper v. Lucey, 488 F.2d 748 (1st Cir. 1973). In *Raper*, the court cited the general no-exhaustion rule and noted that its cases seemed to be contrary to that rule. The court then held that its prior cases were disapproved "[t]o the extent that they indicate a general or automatic requirement of administrative exhaustion." *Id.* at 751 n.3. This may indicate that the court is retaining a flexible rule and that exhaustion or no exhaustion will be determined on a case by case basis. *See* Beattie v. Roberts, 436 F.2d 747, 748 (1st Cir. 1971); Drown v. Portsmouth School Dist., 435 F.2d 1182, 1186 (1st Cir. 1970), *cert. denied*, 402 U.S. 972 (1971); Dunham v. Crosby, 435 F.2d 1177, 1180 (1st Cir. 1970).

the plaintiff is threatened with only a future deprivation of rights by a properly constituted agency,[88] (5) exhaustion will be required if the claim should have been brought under another statute which shows a congressional intent to require exhaustion, and (6) some courts will shun any hard and fast rules and will adopt a pattern of flexibility in applying the exhaustion doctrine.[89]

Other suggestions have been made, including requiring exhaustion only if the agency determination would avoid any constitutional issue.[90] Another suggestion is to require exhaustion if a plaintiff is suing only as an individual and not to require it if he is suing on behalf of a class to protect rights common to that group.[91] One final suggestion, making all these other exceptions unnecessary, would be not to require exhaustion at all in suits brought under section 1983.

III. Reasons for not Requiring Exhaustion

There are many good reasons for not requiring exhaustion of administrative remedies in actions under section 1983. The confusion presently surrounding this doctrine would be removed

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[88] *Compare* Gibson v. Berryhill, 411 U.S. 564 (1973), *with* Whitner v. Davis, 410 F.2d 24 (9th Cir. 1969).

[89] *See* Blanton v. State Univ., 489 F.2d 377 (2d Cir. 1973); Raper v. Lucey, 488 F.2d 748 (1st Cir. 1973); Brooks v. Center Township, 485 F.2d 383 (7th Cir. 1973); Mattingly v. Elias, 482 F.2d 526 (3d Cir. 1973); Goetz v. Ansell, 477 F.2d 636 (2d Cir. 1973); Ray v. Fritz, 468 F.2d 586 (2d Cir. 1972); James v. Board of Educ., 461 F.2d 566, 570 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972); Metcalf v. Swank, 444 F.2d 1353 (7th Cir. 1971), *vacated*, 406 U.S. 914 (1972); Dunham v. Crosby, 435 F.2d 1177 (1st Cir. 1970); Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969), *cert. denied*, 400 U.S. 841 (1970); Marin v. University of P.R., 346 F. Supp. 470 (D.P.R. 1972); David v. New York Tel. Co., 341 F. Supp. 944 (S.D.N.Y.), *aff'd on other grounds*, 470 F.2d 191 (2d Cir. 1972); McCray v. Burrell, 367 F. Supp. 1191 (D. Md. 1973); Hayes v. Cape Henlopen School Dist., 341 F. Supp. 823 (D. Del. 1972); Vistamar, Inc. v. Vasquez, 337 F. Supp. 375 (D.P.R. 1971); Griffin v. DeFelice, 325 F. Supp. 143 (E.D. La. 1971). *See also* Jackson v. Hepenstall, 328 F. Supp. 1104 (N.D.N.Y. 1971). This case involved a suit against the Superintendent of the Albany schools by a plaintiff challenging a state statute which permitted suspensions for five days without a hearing. The court declared that "plaintiffs in these purported Civil Rights cases may not turn their backs on state administrative remedies and rush into a federal forum." *Id.* at 1108, *citing* Eisen v. Eastman, 421 F.2d 560, 569 (2d Cir. 1969), *cert. denied*, 400 U.S. 841 (1970).

[90] Elmwood Properties, Inc. v. Conzelman, 418 F.2d 1025 (7th Cir. 1969).

[91] *See* Comment, *Exhaustion of State Remedies Under the Civil Rights Act*, 68 Colum. L. Rev. 1201, 1209 (1968). *See also* Note, *Limiting the Section 1983 Action in the Wake of* Monroe v. Pape, 82 Harv. L. Rev. 1486 (1969), for a parallel argument in regard to the jurisdictional requirement, as opposed to the exhaustion requirement, of the federal courts under section 1983.

if courts would compare the purposes to be served by requiring exhaustion with the peculiar needs served by civil rights actions. When this is done, most of the reasons for requiring exhaustion simply are either not present or do not outweigh competing interests.[92]

The value of expertise found in administrative agencies, for example, would not always be present. The only experts on constitutional rights are the courts and they should not be prevented from hearing cases involving important federal and constitutional rights because the agency may have expertise in another area.[93] The rule that a plaintiff need not exhaust judicial remedies is well settled. Therefore, the federal courts could hear such cases immediately.

It would also seem that the "sifting function" performed by agencies may not be welcome when such important rights and potential for bias are present. Certainly the delay inherent in using the administrative process may divert some from seeking vindication of their rights. Moreover, when the individual is a member of a class and is suing to protect the rights of the class, an individual settlement may be satisfactory as far as the individual plaintiff is concerned, but it does not protect other class members from similar deprivations nor does it correct state laws to conform to constitutional requirements.

In addition, overburdening of the federal courts has not been a problem since section 1983 has been broadened and since entry requirements to a federal forum have been relaxed.[94] It is also

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[92]*But see* 17 VILL. L. REV. 336, 349 (1971).

[93]Metcalf v. Swank, 444 F.2d 1353, 1363 (7th Cir. 1971) (dissenting opinion); Goldfarb & Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 175, 262 n.569 (1970).

[94]*See* Sedler, Dombrowski *in the Wake of* Younger: *The View from Without and Within*, 1972 WIS. L. REV. 1. The author notes that, out of 93,207 civil cases brought in the federal courts, the most substantial portion were brought under diversity jurisdiction. Only 3,616 were civil rights cases.

This caseload may also be "transitional." *See* Chevigny, *Section 1983 Jurisdiction: A Reply*, 83 HARV. L. REV. 1352, 1354 (1970). Mr. Chevigny is also speaking to the expanded scope of section 1983 and not only to the relaxation of the exhaustion requirement when he states that an examination of cases from December 1966 to March 1968 shows that most cases were dismissed on the face of the complaint. This suggests that "most section 1983 cases present simple fact situations with a clear issue of federal law requiring limited, if any, evidentiary hearings. Federal courts, then, do not appear so overburdened with avoidable, trivial cases as to require any major retrenchment in civil rights protection." *Id.* at 1354-55.

But see McCray v. Burrell, 367 F. Supp. 1191 (D. Md. 1973); Younger, *State v. Uncle Sam*, 58 A.B.A.J. 155, 157 (1972); Note, *Limiting the Section 1983 Action in the Wake of* Monroe v. Pape, 82 HARV. L. REV. 1486, 1493 & n.11 (1969).

arguable that federal courts should be more concerned with these cases due to the importance of the federal rights involved than with cases based merely on diversity of citizenship. Those cases comprise the major portion of federal litigation.

It is also arguable that agencies would not lose any incentive to correct their own errors. Indeed, such incentives may even be increased and may result in achieving a higher standard for protecting civil rights than heretofore achieved. This result would follow because administrative agents may be personally liable under section 1983 for any deprivation of federal rights brought about because of their actions. This would make the entire administrative hierarchy more attentive to federal standards in this sensitive area.[95] Further, friction between states and the federal judiciary might actually be lessened since federal courts would no longer have to judge the adequacy of state administrative remedies.

It is also very doubtful that considerations of friction-avoidance have any place in civil rights litigation in light of the history and purposes of section 1983. That section was intended to erect a barrier between states and their citizens and to provide those citizens with neutral forums in which to adjudicate their rights.[96] The statute's history demonstrates that Congress knew it was altering the relationship between the states and the nation with respect to the protection of federally created rights.[97] Furthermore, Congress was concerned that state instrumentalities could not protect those rights. The very purpose of section 1983 was to interpose the federal courts between the states and the people, as guardians of the people's federal rights.[98] Recent court

[95] *See* Chevigny, *Section 1983 Jurisdiction: A Reply*, 83 HARV. L. REV. 1352, 1360 (1970).

[96] Note, *Section 1983: A Civil Remedy for the Protection of Federal Rights*, 39 N.Y.U.L. REV. 839 (1964).

[97] *Ex parte* Virginia, 100 U.S. 339, 346 (1879). This has recently been recognized by the courts. For example, in Landry v. Daley, 288 F. Supp. 200 (N.D. Ill. 1968), Judge Will noted the concern the Forty-second Congress showed for the enforcement of the Civil War Amendments. He stated:

> By interposing the federal government between the states and their inhabitants, these Congresses sought to avoid the risk of nullification of these rights by the states. With the subsequent passage of the Act of 1871, Congress sought to implement this plan by expanding the federal judicial power. Section 1983 is, therefore, not only an expression of the importance of protecting federal rights from infringement by the states but also, where necessary, the desire to place the national government between the state and its citizens.

Id. at 223 .

[98] *Ex parte* Virginia, 100 U.S. 339, 346 (1879). It was precisely this federal interposition that opponents of the act so feared. *See* CONG. GLOBE, 42d Cong., 1st Sess. 50 (Appendix 1871) (remarks of Congressman Kerr);

interpretations have also seen the Act in this light. As one court said:

> The Act was not one artfully phrased so as *not* to disturb the relationship between the States and the Nation. If there is one thing certain about the legislative history of the Act, it is that Congress, open-eyed, deliberately set out to alter the so-called "delicate balance" between the state and the federal government so that federal courts could effectively protect federal rights.[99]

That Congress intended the federal courts to protect these rights can also be demonstrated through an examination of the purposes the Act was to promote. Section 1983 was designed to protect federal rights in federal courts "because by reason of prejudice, passion, neglect, intolerance or otherwise" state courts were not enforcing them.[100] To protect these rights, Congress designed section 1983 to override particular state laws, to provide remedies when state laws are inadequate, to provide remedies when the state remedies are not available in practice and to provide supplementary remedies to those offered by the states.[101]

Section 1983 was also passed to promote other goals. It was designed to promote greater uniformity throughout the United States in the protection of federal rights. It was also designed to allow federal judges to decide civil rights cases. This was considered desirable because federal judges would not be as prone to compromise federal rights if they conflicted with state statutes as would state judges or administrators. In addition, federal judges would not be as subject to community pressures as would state judges and administrators. For example, state agents and judges often depend on community good will for their re-election or re-appointment and, hence, are careful not to decide cases in ways which arouse local anger. Federal judges, who enjoy life tenure, do not face this kind of local pressure. These policies suggest that, even though there is a recognized state interest in having comprehensive administrative schemes, there is an overriding federal interest in preserving federally granted rights and in providing an efficient remedy for their deprivation.[102]

CONG. GLOBE, 42d Cong., 1st Sess. 216 (Appendix 1871) (remarks of Senator Thurman).

[99]Moreno v. Henckel, 431 F.2d 1299, 1305 (5th Cir. 1970).

[100]Monroe v. Pape, 365 U.S. 167, 180 (1961).

[101]*Id.* at 173-74.

[102]Kates & Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Act*, 45 S. CAL. L. REV. 131, 146 (1972); Comment, *Exhaustion of State Remedies Under the Civil Rights Act*, 68 COLUM. L. REV. 1201, 1207 (1968).

Exhaustion of available administrative procedures should retain validity in three instances. One is a situation in which the plaintiff faces only a future, threatened deprivation of rights. Exhaustion in this situation would insure an authoritative institutional decision that would be final in the sense of being ripe for adjudication.[103] This exception to a no-exhaustion rule should be narrowly confined to those cases in which there is an adequate remedy available and plaintiffs would suffer no irreparable harm by the consequent delay. In addition, the no-exhaustion rule should be discretionary with the courts when a case involves questions of local law. In such a case, administrative exhaustion would aid the courts by interpreting and untangling the state law from the federal issues. Finally, the no-exhaustion rule should not be applicable when the section 1983 claim is used merely to avoid exhaustion requirements imposed by other applicable statutes. This exception should be confined solely to those cases in which another federal statute is present evidencing a congressional intent to require exhaustion.[104]

IV. Exhaustion Requirements in Sections 1981 and 1982 Actions

A. History

All the Civil Rights Acts[105] were passed to implement the Civil War Amendments and all "were originally designed to guarantee certain fundamental rights to the emancipated Negro."[106] Sections 1981[107] and 1982[108] were passed in 1866 to enforce the

[103]*See* Stevenson v. Board of Educ., 426 F.2d 1154 (5th Cir.), *cert. denied*, 400 U.S. 957 (1970). *See also* Beattie v. Roberts, 436 F.2d 747 (1st Cir. 1971); Hall v. Garson, 430 F.2d 430, 436 n.11 (5th Cir. 1970); Boyd v. Smith, 353 F. Supp. 844, 846 (N.D. Ind. 1973); Tillman v. Dade County School Bd., 327 F. Supp. 930 (S.D. Fla. 1971).

[104]Preiser v. Rodriguez, 411 U.S. 475 (1973).

[105]Civil Rights Act of 1866, 14 Stat. 27 (codified in 42 U.S.C. §§ 1981, 1982 (1970)); The Enforcement Act, 16 Stat. 140 (1870); Amendments to the Enforcement Act, 16 Stat. 433 (1871); Civil Rights Act of April 20, 1871, 17 Stat. 13 (codified in 42 U.S.C. §§ 1983, 1985(3)).

[106]17 Vill. L. Rev. 336, 338 (1971).

[107]42 U.S.C. § 1981 (1970). This statute states:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.

[108]42 U.S.C. § 1982 (1970). This statute states:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof

thirteenth amendment's bar against slavery and involuntary servitude. These sections have been held applicable against all acts of discrimination whether public or private, federal or state.[109] They are broader than section 1983 since they are not limited to the "under color of state law" requirement of that section.[110]

B. State Action—A Key Distinction

Although these sections were all passed to implement the Civil War Amendments, section 1983 enforces the fourteenth amendment while the other two enforce the thirteenth.[111] The Supreme Court has held that "different problems of statutory meaning are presented by two enactments deriving from different constitutional sources."[112] While this statement indicates that the same words in sections 1981 and 1982 will be treated differently than they are treated in section 1983, it may also imply, by analogy, that different remedies will be available under them. This is further strengthened by the differences between section 1983 and sections 1981 and 1982.

The key ingredient in section 1983 suits is the presence of state action in some form. At the same time, the remedies the plaintiff is required to pursue are also the state's. This often means that a state agency, whose agents are state officers, is

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to inherit, purchase, lease, sell, hold, and convey real and personal property.

[109]For cases extending the scope of section 1981 to actions of private citizens, *see* Brady v. Bristol-Meyers, Inc., 459 F.2d 621, 623 (8th Cir. 1972); Tramble v. Converters Ink Co., 343 F. Supp. 1350, 1352 (N.D. Ill. 1972); Sims v. Order of United Commercial Travelers of America, 343 F. Supp. 112, 114 (D. Mass. 1972). For cases extending the scope of section 1982 to actions of private citizens, see Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

[110]For example, if a black is denied a chance to hold property by another private citizen, he can bring a suit against that person under section 1982. Section 1983 would not be applicable to this suit since the state is not involved. If this plaintiff were denied the right to hold property because of a state statute saying that blacks may not hold property, he could bring suit under both sections 1982 and 1983. Very often, a suit will be brought under all three sections simultaneously.

[111]There is some debate on this interpretation. Some courts maintain that the reenactment of sections 1981 and 1982 after the passage of the fourteenth amendment, in the Act of May 31, 1870, 16 Stat. 144, was intended to make these sections applicable only when state action and, hence, the fourteenth amendment, was involved. *See* Cook v. Advertiser Co., 323 F. Supp. 1212 (M.D. Ala. 1971). For a good discussion of these conflicting interpretations, see Note, *Section 1981 and Private Discrimination: An Historical Justification for a Judicial Trend*, 40 GEO. WASH. L. REV. 1024 (1972).

[112]Monroe v. Pape, 365 U.S. 167, 205-06 (1961) (Frankfurter, J., dissenting), *cited with approval in* District of Columbia v. Carter, 409 U.S. 418 (1973).

asked to review the actions of other state officers or the actions of the agency's employer. It is not improbable that the agent will be biased in favor of the defendant since they are both state affiliated or are officers of the same employer. This inherent potential for bias makes administrative remedies, in the eyes of those favoring a no-exhaustion rule, inadequate under section 1983. It is this same potential which would make them inadequate for section 1981 or 1982 plaintiffs suing a state's officers.

But this inherent potential for bias is absent when a state official is not a party to the litigation and when agency actions are not in issue. The state agency can be presumed to be neutral when the case before it is one between two private citizens who are not connected to the state and are not raising questions of state action.

C. Exhaustion—The Courts' Decisions

All this would indicate that section 1981 and 1982 plaintiffs should not be required to exhaust their administrative remedies when they are suing the state in some form and that they should be required to exhaust when they are suing merely a private citizen. Such an easy analysis is complicated by two factors. One is the often-present bias against minority groups and the second is the presence of federal statutes requiring exhaustion in certain instances. Race may work to make the remedy inadequate while statutes may have the effect of requiring its exhaustion.

The courts which have dealt with the exhaustion issue have unanimously adopted a flexible rule so that factors such as race, state action, and federal statutes may be considered. Although the Supreme Court has never dealt with the exhaustion issue solely under these two sections, several circuit courts have dealt with it in relation to the exhaustion of *federal* administrative remedies. An analysis of these cases will be helpful in developing an exhaustion formula applicable to *state* administrative remedies.

One court to decide a case involving federal administrative remedies has been the Fifth Circuit in *Beale v. Blount.*[113] In *Beale,* suit was brought by a substitute mail carrier for reinstatement and injunctive relief against the Post Office Department. He had not exhausted available administrative remedies prior to initiating suit.

The court noted the no-exhaustion rule established by the Supreme Court for section 1983 plaintiffs and rejected that rule as applying to section 1981 plaintiffs. The court believed that this plaintiff's plight was "totally dissimilar" to that of a sec-

[113] 461 F.2d 1133 (5th Cir. 1972), *noted in* 41 GEO. WASH. L. REV. 657 (1973).

tion 1983 plaintiff since the federal government, not a state government, was involved. There was no potential for bias against black plaintiffs because the federal government, as a matter of policy, forbids racial discrimination in any government dealings.[114] Hence an adequate and impartial remedy was available. The court also noted that an early judicial forum would tend to undermine the efforts of the federal bureaucracy to correct its own errors. The court concluded that "the time-tested requirement that available administrative remedies be exhausted prior to the institution of a mandamus action" would be adhered to.[115]

A flexible rule has been reached by three other courts deciding similar cases dealing with exhaustion of federal administrative remedies. These courts adopted a flexible rule of exhaustion so that an accommodation between their jurisdictions under section 1981 and the administrative agencies' jurisdiction under the federal statutes could be developed on a case by case basis.[116] A firm rule of exhaustion or no-exhaustion, the Seventh Circuit Court of Appeals noted in *Waters v. Wisconsin Steel Works of International Harvester*,[117] would eventually lead to irreconcilable conflicts between federal statutes (in that case section 1981 and Title VII) which might result in the nullification of one statute by the other. A flexible rule would avoid such a clash.

D. Guidelines for an Exhaustion Rule

Although these cases deal only with the exhaustion of federal remedies, their rulings, combined with several theories borrowed from section 1983 suits, may establish guidelines for exhaustion rules in section 1981 and section 1982 suits involving state administrative remedies. Several rules emerge: First, exhaustion should not be required if, for any reason, the adminis-

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[114]461 F.2d at 1139.

[115]*Id.* The court clearly indicated that exhaustion would not be required in suits brought under section 1983 since "[t]he Supreme Court's decisions in *Monroe*, *McNeese* and *Damico* make it clear that such exhaustion is not required of a section 1983 plaintiff no matter what state administrative avenues of relief are open to him." *Id.* at 1139 n.11.

[116]Penn v. Schlesinger, 490 F.2d 700 (1973), *rev'd on rehearing*, 497 F.2d 970 (5th Cir. 1974); Young v. International Tel. & Tel. Co., 438 F.2d 757 (3d Cir. 1971); Waters v. Wisconsin Steel Works of Int'l Harvester, 427 F.2d 476, 485 (7th Cir.), *cert. denied*, 400 U.S. 911 (1970). In the *Schlesinger* case, the court held that exhaustion under sections 1981 and 1982 was not a matter of black letter law and that exhaustion should be decided on a case by case basis. The court decided that plaintiffs should not be required to exhaust any further administrative remedies in that case because the agency had failed to process their grievances.

[117]427 F.2d 476, 485 (7th Cir.), *cert. denied*, 400 U.S. 911 (1970).

trative remedy is inadequate or if pursuing it would be futile. It would be grossly unfair to deny a civil rights plaintiff the benefit of this general exception to the exhaustion doctrine. Secondly, exhaustion should not be required under sections 1981 or 1982 if a state agency or officer is being sued. In such cases, his suit will probably also be brought under section 1983, and the same reasons that make a by-pass of state remedies necessary in that context would be applicable here as well. Thirdly, exhaustion should be required if Congress has passed a statute evincing an intent to require exhaustion in specific areas or if Congress has established a federal administrative procedure to be exhausted first. Thus, exhaustion would be required in Title VII actions unless the plaintiff proves that his remedy there is inadequate.[118] Finally, for those cases not falling within these three categories, a flexible rule should be adopted according to the circumstances of the case. Since suits in this category will all be brought against private persons (suits against state agencies or their officers fall under the second category), the need for federal intervention will be less. State administrative remedies would not, then, be per se unreasonable but a consideration of various factors could make them so.

The factors a court could consider in reaching its decision concerning exhaustion are numerous. The court could examine the three factors suggested by Professor Davis—the extent of injury to a plaintiff who must exhaust, the ease with which an administrator's jurisdiction over this case can be determined, and the need for specialized administrative understanding in this area.[119] The court may further want to examine the involvement of the agency in the case and may also want to ask whether exhaustion or no-exhaustion would tend to make the agency operate in a remedial fashion.[120] Plaintiffs should be allowed to present evidence of agency bias against minority group plaintiffs. Such a showing, for example, could consist of statistical data concerning the agency's effectiveness in protecting the rights of section 1981 or 1982 plaintiffs.

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[118]See Larson, *The Development of Section 1981 as a Remedy for Private Employment*, 7 HARV. CIV. RIGHTS–CIV. LIB. L. REV. 56 (1972), for an argument that Title VII remedies are so inefficient as to always be "inadequate."

[119]3 DAVIS, *supra* note 1, §§ 20.10 *et seq.* (1958).

[120]Note, *Administrative Law—Judicial Review—Agency Misconduct—The Doctrine of Exhaustion of Administrative Remedies*, 18 WAYNE L. REV. 1403, 1421-22 (1972).

E. Summary of Section 1981 and 1982 Exhaustion Requirements

Although a no-exhaustion rule is desirable in section 1983 cases, it is not as necessary in sections 1981 and 1982 actions for the reason that the essential ingredient of state involvement is often missing. A flexible rule is much more practical. Such a rule could take into account important factors, such as adequacy of the remedy, state involvement, racial bias, and pertinent statutes. A flexible rule would afford better protection for civil rights and would better promote state interests in an administrative scheme. Finally, it would allow courts to accommodate congressional intent to require exhaustion, as voiced in other federal statutes, without destroying the usefulness of sections 1981 and 1982 altogether as might be the case if a firm no-exhaustion rule were adopted.

KRISTIN PFEIFER

Recent Development

Federal Jurisdiction—THREE-JUDGE COURTS—Disposition of case by three-judge court on grounds which would have justified dissolution of three-judge court or refusal to convene court at outset must be appealed to court of appeals rather than Supreme Court.—*Gonzalez v. Automatic Employees Credit Union*, 95 S. Ct. 289 (1974).

An attack upon the constitutionality of the repossession and resale provisions of the Illinois Commercial Code[1] has afforded the United States Supreme Court an opportunity to limit further the effect of the three-judge court statutes[2] and their companion statute allowing direct appeal from such courts to the Supreme Court.[3] The Court availed itself of this opportunity in *Gonzalez v. Automatic Employees Credit Union*.[4]

Alfredo Gonzalez had purchased an automobile in Illinois under a retail installment contract. This contract was assigned to the Mercantile Bank of Chicago, which subsequently repossessed the automobile and resold it to a third party. Gonzalez brought a class action on behalf of himself and all other Illinois debtor-purchasers for declaratory and injunctive relief from the statute under which the bank had purported to act. The district judge convened a three-judge court pursuant to the three-judge court statutes.[5]

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[1] ILL. REV. STAT., ch. 26, §§ 9-503, -504 (1973); *id.*, ch. 95½, §§ 3-114(b), -116(b), -612.

[2] 28 U.S.C. §§ 2281, 2282, 2284 (1970).

[3] *Id.* § 1253.

[4] 95 S. Ct. 289 (1974).

[5] 28 U.S.C. § 2284 (1970) provides in part:

> In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:
>
> (1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

Because Gonzalez was seeking to enjoin the enforcement and operation of state statutes on constitutional grounds, this was an "action . . . required by [*id.* § 2281] to be heard and determined by a district court of three judges . . . ."

This three-judge court did not reach the merits of the plaintiffs' claims of unconstitutionality; instead, it dismissed the complaint, holding that the named representatives of the class, including Gonzalez, lacked standing to maintain a suit.[6]

Section 1253 establishes a right of direct appeal to the United States Supreme Court from an order of a properly convened three-judge court granting or denying injunctive relief.[7] Exercising the right he believed was his under section 1253, Gonzalez appealed the action of the three-judge court to the Supreme Court. Like the district court, the Supreme Court refused to reach the merits of the constitutional claim. The Court further refused, however, to pass upon the validity of the determination by the three-judge district court that the plaintiff lacked standing. Instead, the Court declared itself to be without appellate jurisdiction over the case under section 1253 and remanded the case to the district court.[8] In so holding, the unanimous Court frankly acknowledged that it was establishing a new rule regarding appeals to the Supreme Court under section 1253. The Court further acknowledged that in order to establish this new rule, the principle of stare decisis had to be shunted aside.[9] The Court announced that henceforth, when a three-judge court denies injunctive relief on grounds which would have justified dissolution of that court, or would have justified a refusal to convene a three-judge court at the outset, the plaintiff's sole recourse is to the court of appeals.[10]

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[6]Gonzalez claimed he was not in default under the installment contract. He further alleged that the bank had acted maliciously but did not allege that the bank had acted pursuant to the challenged statute. Because of this, the district court found that the named representatives had suffered no injury by the bank's having acted pursuant to the statutes. Therefore, the court held, the plaintiffs had no standing to challenge the statutes. Mojica v. Automatic Employees Credit Union, 363 F. Supp. 143 (N.D. Ill. 1973) (three-judge court).

[7]

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

28 U.S.C. § 1253 (1970).

[8]The Court vacated the order of the three-judge court and remanded the case to the district court so that a fresh order could be entered by that court and a timely appeal made to the court of appeals. It should be noted, however, that the Court intimated that Gonzalez and Mercantile had settled the claim while the appeal to the Court was pending. 95 S. Ct. at 296 n.21. Gonzalez might not, therefore, prosecute his appeal to the Seventh Circuit Court of Appeals.

[9]*Id.* at 293.

[10]*Id.* at 296.

To those who have followed the attitudes of the members of the Supreme Court toward three-judge courts, the *Gonzalez* decision should come as no surprise. For nearly a quarter of a century, these acts have been subjected to narrowing construction and severe criticism, the latter reaching somewhat of a crescendo in this decade. A cursory review of these attitudes, constructions, and criticisms indicates that *Gonzalez* is merely the freshest step in a succession of predictable measures taken by the Court to shelter its appellate docket and, to a lesser extent, to relieve the burden placed upon the lower levels of the federal judiciary by the three-judge court statutes.

The three-judge court statutes were first enacted in 1910,[11] evidently intended to serve a dual purpose: first, to encumber the attempts of a conservative federal judiciary to strike down on constitutional grounds progressive state economic legislation, and second, to assuage the feelings of the states whose legislation was laid low, by requiring the judicial act to be done by a court with prestige greater than that of a single judge.[12] As amended in 1925,[13] the act required a three-judge court to be impaneled to enjoin on constitutional grounds the enforcement of any state statute or regulation. In 1937, Congress reacted to the judiciary's recalcitrant attitude toward New Deal legislation by extending the requirement of three-judge courts to cases involving the constitutionality of federal legislation.[14] Subsequent congressional action has produced the requirement that three-judge courts be convoked for certain actions under the Civil Rights Act of 1964,[15] and to hear appeals from the Interstate Commerce Commission.[16] Thus, there are currently several statutory provisions regarding the three-judge court. For the purposes of this discussion, the most

[11]Act of June 18, 1910, ch. 309, § 17, 36 Stat. 557. The statute has been amended on a number of occasions. *See, e.g.*, Act of March 4, 1911, ch. 231, § 236, 36 Stat. 1162. It is currently codified at 28 U.S.C. § 2281 (1970).

[12]*See generally* Swift & Co. v. Wickham, 382 U.S. 111, 119 (1965); Bailey v. Patterson, 369 U.S. 31, 33 (1962); Phillips v. United States, 312 U.S. 246, 250 (1941); C. WRIGHT, FEDERAL COURTS § 50 (1970); Ammerman, *Three-Judge Courts: See How They Run*, 52 F.R.D. 293, 296 (1971); Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1 (1964); Hutcheson, *A Case for Three Judges*, 47 HARV. L. REV. 795, 807-10 (1934); Comment, *The Applicability of Three-Judge Courts in Contemporary Law: A Viable Legal Procedure or a Legal Horsecart in a Jet Age?*, 21 AM. U.L. REV. 417, 418-21 (1972).

[13]Act of Feb. 13, 1925, ch. 229, § 1, 43 Stat. 938.

[14]Act of Aug. 24, 1937, ch. 754, § 3, 50 Stat. 752 (now codified at 28 U.S.C. § 2282 (1970)).

[15]42 U.S.C. §§ 1971g, 2000a-5(b), 2000e-6(b) (1970). Similar provisions are found in the Voting Rights Act of 1965. *Id.* §§ 1973b(a), 1973c, 1973h(c).

[16]15 U.S.C. §§ 28, 29 (1970).

important is section 2281, which requires that a three-judge court hear constitutional attacks on state legislation or regulations.[17]

Congress also included in the 1910 Act the provision for direct appeal of three-judge decisions to the Supreme Court.[18] Congress believed it essential that a means for swift final decision be afforded the parties so that the states might suffer a minimum of judicial interference with the administration of their laws.[19]

The so-called "Judges' Bill" of 1925[20] is also important to an understanding of the judicial decimation of the three-judge court statutes. In an action ostensibly unrelated to the expansion or constriction of the three-judge court acts, Congress greatly expanded the control of the Supreme Court over its docket through the use of the discretionary writ of certiorari.[21] Although the Judges' Bill nearly eliminated the right of appeal to the Supreme Court,[22] section 1253 was among the few provisions creating rights of direct appeal which were not abolished.

Some years after the enactment of the Judges' Bill, the Court began to view that legislation as an authorization to construe sections 2281 and 1253 very narrowly in order to give effect to the purposes of Congress. In 1941, Mr. Justice Frankfurter determined that the purpose behind the Judges' Bill was to keep the appellate docket of the Supreme Court within narrow confines;[23] he also attributed to the 1925 Congress an awareness of the seri-

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> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

28 U.S.C. § 2281 (1970).

[18]Act of June 18, 1910, ch. 309, § 17, 36 Stat. 557 (now codified at 28 U.S.C. § 1253 (1970). *See also* Act of March 4, 1911, ch. 231, § 236, 36 Stat. 1162.

[19]See authorities cited in note 12 *supra*.

[20]Act of Feb. 13, 1925, ch. 229, 43 Stat. 936. This Act was called the "Judges' Bill" because it was drafted by a committee of Supreme Court justices. C. WRIGHT, FEDERAL COURTS § 1 (1970).

[21]The discretionary writ of certiorari had originated with the Evarts Act, Act of March 3, 1891, ch. 517, § 6, 26 Stat. 828. The writ was greatly expanded by the Judges' Bill, Act of Feb. 13, 1925, ch. 229, § 237, 43 Stat. 937-38.

[22]Act of Feb. 13, 1925, ch. 229, § 238, 43 Stat. 938; C. WRIGHT, FEDERAL COURTS § 1 (1970).

[23]Phillips v. United States, 312 U.S. 246, 250 (1941). *See also* Taft, *The Jurisdiction of the Supreme Court Under the Act of Feb. 13, 1925*, 35 YALE L.J. 1 (1925).

ous drain upon the federal judiciary caused by the three-judge court statutes. This analysis of congressional intent, Frankfurter decided, reveals the three-judge court provision "not as a measure of broad social policy to be construed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such."[24]

The Supreme Court has consistently observed this canon of narrow construction;[25] constriction of the three-judge court statutes has been the rule and expansion the virtually nonexistent exception. Accordingly, the Court has held that a specific prayer for an injunction is required to trigger the three-judge court procedure under section 2281; a prayer solely for declaratory relief, while equitable in nature and injunctive in effect, is insufficient.[26] The Court has held that ultra vires executive action is not a state statute or regulation for purposes of section 2281 and, thus, cannot form the basis for relief from a panel of three judges.[27] The Court has construed the term "statute" in section 2281 to require legislation of state-wide application.[28] The constitutional claim must be substantial: the claim may not be frivolous,[29] nor may the statute be patently unconstitutional.[30] If it is either, section 2281 does not require a three-judge court. The Court has even applied a narrowing construction to the statutory term "unconstitutionality." While the contention that a state statute violates the supremacy clause of the Constitution is certainly constitutional in nature, such an argument does not compel the convoking of a three-judge court.[31]

Each of the above limitations upon section 2281 may be indirectly reflected in the appellate docket of the Supreme Court. Section 1253 gives a party the right to appeal from an order granting or denying injunctive relief in an action "required by any Act of Congress to be heard and determined by a district court of three judges." Thus, each time the Supreme Court establishes a new exception to the requirements for a three-judge court, it effectively establishes, albeit indirectly, a new exception to the right of direct appeal. Even procedural exceptions can have such an effect.

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[24]Phillips v United States, 312 U.S. 246, 251 (1941).

[25]The *Gonzalez* Court cited Justice Frankfurter's language from Phillips v. United States, 312 U.S. 246 (1941), with approval. 95 S. Ct. at 294-95 n.16.

[26]Perez v. Ledesma, 401 U.S. 82, 86 (1971); Mitchell v. Donovan, 398 U.S. 427 (1970); Rockefeller v. Catholic Medical Center, 397 U.S. 820 (1970).

[27]Phillips v. United States, 312 U.S. 246 (1941).

[28]Moody v. Flowers, 387 U.S. 97 (1967); Phillips v. United States, 312 U.S. 246 (1941).

[29]*Ex Parte* Poresky, 290 U.S. 30 (1933).

[30]Bailey v. Patterson, 369 U.S. 31 (1962).

[31]Swift & Co. v. Wickham, 382 U.S. 111 (1965).

Although the statute setting forth the procedure to be followed when a three-judge court is required specifically prohibits a single judge from dismissing a case for any reason other than failure to meet the requirements of section 2281,[32] the Court has effectively read this provision out of the statute books.[33] Nor has section 1253 itself been spared the narrowing construction applied to section 2281: the Court has long since determined that section 1253[34] does not create a right of appeal in cases which were actually decided by a single judge although they should have been decided by a three-judge court under section 2281.[35] Even more astonishingly, the Court has explicitly disclaimed jurisdiction over interlocutory orders denying permanent injunctions despite clear language in section 1253 establishing the right to appeal any three-judge court order granting or denying an "interlocutory or permanent injunction."[36]

In addition to this virtually unbroken string of cases narrowing the application of the three-judge court acts and the right to direct appeal, recent years have witnessed an unprecedented series of attacks from all sides upon the three-judge court procedure. The basis of the majority of these attacks has been the strain placed upon the federal judiciary by the three-judge court requirements.[37]

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[32]28 U.S.C. § 2284 (1970) provides in part:

> (5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment.

[33]Gonzalez v. Automatic Employees Credit Union, 95 S. Ct. 289, 293-94 n.14 (1974); Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 715 (1962); Bailey v. Patterson, 369 U.S. 31 (1962); *Ex Parte* Poresky, 290 U.S. 30 (1933).

[34]28 U.S.C. § 1253 (1970) is reprinted at note 7 *supra*.

[35]"We have glossed over the provision so as to restrict our jurisdiction to orders actually entered by three-judge courts." Gonzalez v. Automatic Employees Credit Union, 95 S. Ct. 289, 293-94 n.14 (1974). *See* Schackman v. Arnebergh, 387 U.S. 427 (1967); Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713 (1962); Stratton v. St. Louis S.W. Ry., 282 U.S. 10 (1930); *Ex Parte* Metropolitan Water Co., 220 U.S 539 (1911).

[36]Rockefeller v. Catholic Medical Center, 397 U.S. 820 (1970); Goldstein v. Cox, 396 U.S. 471 (1970).

[37]The administrative drain upon the district and circuit courts has increased dramatically in the past decade. The average number of cases heard by three-judge courts from 1955 to 1959 was 48.8 per year; from 1960 to 1964, the average per year was 95.6. AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1374, at 317 (1969) (hereinafter cited as ALI STUDY). From 1969 to 1973, the average per year was 290.8. There were 320 such cases in 1973 compared to 119 in

Although the American Law Institute concluded in 1969 that "the burden on the federal judicial system that a three-judge court creates is outweighed by the beneficial effect it has on federal-state relations,"[38] the Institute nonetheless recommended a number of amendments to limit the three-judge court requirement.[39] Subsequent recommendations have not exhibited the tolerance shown by the ALI of this burden on the judiciary. In 1970 the Judicial Conference of the United States called for the abolition of three-judge courts except when expressly required by an Act of Congress.[40] The primary focus of these studies was upon the district and circuit court levels of the federal judiciary and the disruptive effect of three-judge courts upon the dockets of those courts.

Other criticisms have found their justification in the effect of section 1253 on the docket of the Supreme Court. Chief Justice Burger has been quite blunt in his objections to the three-judge court procedure,[41] and at least two Associate Justices have advocated the elimination of the three-judge court.[42] The Report of the Study Group on the Caseload of the Supreme Court, now commonly called the "Freund Report," recommended that section 2281 be repealed.[43] This recommendation, however, has gone somewhat

1964. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 1973 ANNUAL REPORT pt. II, at 40.

The burden upon these judges cannot be fully appreciated through mere reference to statistics, however. A great deal of travel is involved in the typical three-judge court case. For example, for the hearing of Communist Party v. Sendak, No. 72-H-224 (N.D. Ind., Sept. 28, 1972), *rev'd sub nom.*, Communist Party v. Whitcomb, 414 U.S. 441 (1974), district judges from Indianapolis and Fort Wayne and a circuit judge from Chicago met and heard the case in Hammond, Indiana.

[38]ALI STUDY § 137, at 320.

[39]*Id.* §§ 1374-76.

[40]REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 78-79 (1970).

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> I firmly endorse the American Law Institute's recommendations, but I would go beyond them. We should totally eliminate the three-judge district courts that now disrupt district and circuit judges' work. Direct appeal to the Supreme Court, without the benefit of intermediate review by a court of appeals, has seriously eroded the Supreme Court's power to control its workload, since appeals from three-judge district courts now account for one in five cases heard by the Supreme Court. The original reasons for establishing these special courts, whatever their validity at the time, no longer exist.

Burger, *The State of the Federal Judiciary—1972*, 58 A.B.A.J. 1049, 1053 (1972).

[42]Brennan, *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473, 474 (1973); Rehnquist, *Whither the Courts?*, 60 A.B.A.J. 787, 790 (1974).

[43]REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT 30 (1972).

unnoticed amidst the furor generated by the Freund Report's call for the establishment of a National Court of Appeals to limit the annual caseload of the Supreme Court to four hundred cases.[44]

In light of the history of narrow construction of the three-judge court statutes and the accompanying right to appeal and of the recent vehement criticisms of the three-judge court concept and procedure, the *Gonzalez* decision cannot be said to have been unforeseeable. The only surprise to be found in the case is a mild one. The respondent argued that the Supreme Court should not exercise jurisdiction under section 1253 in cases in which the three-judge district court failed to reach the merits of the plaintiff's claim.[45] The Court rejected this formulation of section 1253 and instead adopted a rule which arguably goes beyond that proferred by the respondent. In holding section 1253 inapplicable when a three-judge court denies relief on grounds which would have justified refusal to convoke the panel ab initio, the Court has disclaimed jurisdiction in cases in which the three-judge court reaches the merits but finds that the claim was not substantial. In other words, if the panel finds that the plaintiff's claim is frivolous or that the statute or regulation at issue is patently unconstitutional, the Court is without jurisdiction to entertain a direct appeal under section 1253.[46]

An examination of the *Gonzalez* decision calls forth several reflections, both upon the narrow holding of the case itself and upon the milieu in which judgment was rendered. *Gonzalez* is a decision which bears tangible fruits for bar, bench, and litigant and at the same time gives rise to certain disappointments.

Among the benefits to be perceived in the *Gonzalez* holding is the resolution of the quandary heretofore faced by an unsuccessful party as to where he should file an appeal. Prior to *Gonzalez,* the party was required to appeal to the Supreme Court pursuant to section 1253 if a three-judge court dismissed his complaint for want of subject-matter jurisdiction[47] but was required to appeal to the court of appeals if the dismissal of his complaint was based upon lack of statutory jurisdiction.[48] Thus, unless the party was able to determine the basis of the dismissal by the three-judge court, his most prudent course of conduct was to file an appeal

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[44]*Id.* 10-24.

[45]95 S. Ct. at 295.

[46]*See* Bailey v. Patterson, 369 U.S. 31 (1962); *Ex Parte* Poresky, 290 U.S. 30 (1933).

[47]Flast v. Cohen, 392 U.S. 83 (1968); Baker v. Carr, 369 U.S. 186 (1962); Florida Lime & Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73 (1960); California Water Co. v. City of Redding, 304 U.S. 252 (1938).

[48]Mengelkoch v. Industrial Welfare Comm'n, 393 U.S. 83 (1968); Wilson v. City of Port Lavaca, 391 U.S. 352 (1968).

in the Supreme Court in an attempt to invoke its jurisdiction under section 1253 and, simultaneously, to file a protective appeal with the appropriate court of appeals. The failure to file a protective appeal might result in total denial of appellate review if the Supreme Court were to decide, after the expiration of the time for filing an appeal in the court of appeals, that it was without appellate jurisdiction under section 1253.[49] Because a single judge is permitted to determine the absence of subject-matter jurisdiction, and on that basis refuse to convoke a three-judge court,[50] it seems clear that *Gonzalez* requires the party whose relief is denied for want of either statutory or subject-matter jurisdiction to appeal to the court of appeals.

A further benefit which will accrue from the *Gonzalez* opinion is the inevitable easing of the docket pressures upon the Supreme Court. It is impossible to predict how slight or great this easing will be, for one cannot say how many judgments of three-judge courts will be rendered on grounds which now require appeal to the court of appeals. It would seem, however, that any reduction in the appellate docket of the Court will be significant, since twenty-two per cent of the cases argued orally before the Court from 1969 to 1971 were appeals from three-judge courts.[51]

Still another benefit which might be produced by *Gonzalez* is the sudden availability to a party of a realistic forum for review of an adverse decision by a three-judge court. Mr. Justice Rehnquist has noted that during the 1971 term approximately fifty appeals from three-judge courts were summarily affirmed,[52] and that figure may be an underestimate.[53] Justice Rehnquist has also conceded: "No one seriously contends that these summary

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[49]This possibility may be more theoretical than practical. Upon finding itself without jurisdiction under section 1253, the Supreme Court has made a practice of remanding the case to the district court for the entry of a fresh order from which the party could file a timely appeal in the court of appeals. *See, e.g.*, Gonzalez v. Automatic Employees Credit Union, 95 S. Ct. 289 (1974); Mengelkock v. Industrial Welfare Comm'n, 393 U.S. 83 (1968); Wilson v. City of Port Lavaca, 391 U.S. 352 (1968).

[50]*See* notes 32 and 33 *supra* & accompanying text.

[51]REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT 29 (1972).

[52]Rehnquist, *supra* note 40, at 790.

[53]In the 1971 term referred to by Justice Rehnquist, 120 appeals from three-judge courts were filed with the Supreme Court. REPORT OF THE STUDY GROUP OF THE CASELOAD OF THE SUPREME COURT A11 (1972). According to Justice Stewart's opinion in *Gonzalez*, the "Court typically disposes summarily of between ⅔ and ¾ of the three-judge court appeals filed each term." 95 S. Ct. at 295 n.17, *citing* Douglas, *The Supreme Court and Its Case Load*, 45 CORNELL L.Q. 401, 410 (1960). Applying this estimate to the 1971 term, between eighty and ninety such appeals would have been dealt with summarily.

affirmances receive the full consideration that is given to a case argued on the merit and disposed of by written opinion . . . ."[54] The docket of the Court, however, is such that summary disposition of many cases is required.[55] The practical effect of this type of near nonreview is that an appellant is afforded no forum in which he may fully argue his position.[56] Again, one cannot predict the number of parties, whose cases would have been summarily decided by the Supreme Court, who will now be enabled to assert their positions before a court of appeals. It must be assumed that these courts will have at least slightly more time than the Supreme Court to devote to such cases. For each such appellant, *Gonzalez* may prove to be a boon.[57]

Despite these beneficial effects of *Gonzalez*, one cannot help but be somewhat discouraged by the opinion. The extremes which the Court felt were necessary for a disavowal of the doctrine of stare decisis in the area of three-judge court law are at best discomforting. Writing for the Court, Mr. Justice Stewart candidly stated:

> [I]t is also a fact that in the area of statutory three-judge court law the doctrine of *stare decisis* has historically been accorded less than its usual weight. These procedural statutes are very awkwardly drafted, and in struggling to make workable sense of them, the Court has not infrequently been induced to retrace its steps.[58]

In a footnote to this passage, Justice Stewart graphically set forth a number of cases in which the Court has "been induced to retrace its steps."[59] Regardless of the validity of Justice Stewart's state-

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[54]Rehnquist, *supra* note 40, at 790.

[55]Appeals from three-judge courts constituted twenty-two percent of *all arguments* heard by the Court during the 1971 term despite disposition without argument of eight-two percent of *all appeals* filed. REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT 29, A10 (1972).

[56]Justice Brennan has indicated that the Court is aware of this effect and thus is more likely to attempt to hear the appeal. Brennan, *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473, 474 (1973). It is unfortunate that so laudable a concern does not ease the pressures of the Court's appellate docket.

[57]The Court indicated its awareness of this effect. 95 S. Ct. at 295 n.17.

[58]*Id.* at 293.

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> Cases in which the District Court had denied injunctive relief for want of standing, or of justiciability generally: *Florida Lime & Avocado Growers v. Jacobsen*, 362 U.S. 73; *Baker v. Carr*, 369 U.S. 186; *Flast v. Cohen*, 392 U.S. 83; *Richardson v. Kennedy*, 401 U.S. 901; *Granite State Falls Bank v. Schneider*, 402 U.S. 1006. Cases where denial was for want of subject-matter jurisdiction: *Lynch v. Household Finance Corp.*, 405 U.S. 538; *Carter v. Stanton*, 405 U.S. 669. Cases where denial was on grounds of abstention or for want of

ment or the justness of the *Gonzalez* decision, the divorce of an entire area of law from the doctrine of stare decisis is somewhat disconcerting. One cannot help but entertain the rather naive hope that at its next opportunity the Court will retract this caveat toward prior case law. Otherwise *Gonzalez* will serve to encourage litigants to argue the "unworkability" of current law to the Court, and further anomolies may well arise in this already unsettled area of the law. One must hope that the Court will hereafter attempt to establish lasting rules for the guidance of litigants and attorneys. As an alternative, one might entertain the hope that intervening legislation will make further litigation of three-judge court law unnecessary.

Another disappointment one might experience upon reflecting on *Gonzalez* is that while the decision will certainly serve to ease the strain on the docket of the Supreme Court, it does nothing to relieve the burden of the three-judge court statutes on the lower levels of the federal judiciary.[60] In one sense, the decision has even increased the burden: each case which fits the *Gonzalez* mold will now require the time of four judges of circuit courts of appeals in addition to the time of two district judges.[61]

Perhaps the most profound disappointment regarding *Gonzalez,* however, is the fact that it was necessary at all. Despite the fervent pleas that have arisen from within the legal profession for the abolition, or at least the curtailment, of the three-judge court laws, Congress has failed to respond. Regardless of the conceded validity of the system in 1910, the three-judge court acts have outlived their usefulness and have become anachronistic. Yet this musty procedure continues to require circuit judges to abandon their schedules to appear at the nisi prius level of litigation. District judges, already swamped by their own dockets, are forced by these statutory relics to "double up" on cases which could just as easily be determined by a single judge. The Supreme Court continues to be required by section 1253 to rule in direct appeals, losing a large degree of control over its docket, the management of which is so burdensome that Chief Justice Burger

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equitable jurisdiction: *Doud v. Hodge,* 350 U.S. 485; *Zwickler v. Koota,* 389 U.S. 241; *Mitchum v. Foster,* 407 U.S. 225; *American Trial Lawyers Assn. v. New Jersey Supreme Court,* 409 U.S. 467. 95 S. Ct. at 293 n.11. Under the *Gonzalez* holding, none of these cases, of course, would have reached the Court without prior review by a court of appeals.

[60]See note 36 *supra.*

[61]28 U.S.C. § 2284 (1970) requires that at least one circuit judge sit on a three-judge court. See note 5 *supra.* When an appeal is taken to a court of appeals from a three-judge court, three more circuit judges will be drawn into the case.

today calls for the creation of a special court to manage that docket.[62] The benefits of the three-judge court laws no longer outweigh the unworkable situation which the laws create. *Gonzalez* demonstrates the twin problems facing the courts in this area: the need for change, and the constitutional inability to satisfactorily effect the change. Congress must act to strip the statute books of the three-judge court laws. Until it does, the Supreme Court is powerless to strike down those laws as unconstitutional. As in *Gonzalez*, the Court can only effectively strike them down as inconvenient.

ROBERT L. MILLER, JR.

[62] *See* Burger & Warren, *Retired Chief Justice Warren Attacks, Chief Justice Burger Defends Freund Study Group's Composition and Proposal*, 59 A.B.A.J. 721 (1973); Burger, *Report on the Federal Judicial Branch—1973*, 59 A.B.A.J. 1125 (1973).